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THE
HOUSE OF LORDS
CASES,

ON

APPEALS AND WRITS OF ERROR

AND

Claims of Peerage,

DURING THE SESSIONS

1858, 1859 AND 1860.

BY

CHARLES CLARK, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

(By Appointment of the House of Lords.)

VOL. VII.

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MEMORANDA.

IN Trinity Term 1859, Lord Chelmsford resigned the Great Seal, which was thereupon delivered to the Right Hon. Lord Campbell, who, having resigned his office of Lord Chief Justice of England, shortly afterwards took his seat on the Woolsack as Lord Chancellor.

The Right Hon. Sir A. J. E. Cockburn, Lord Chief Justice of the Court of Common Pleas, having resigned that office, was appointed Lord Chief Justice of England.

Sir W. Erle, one of the Judges of the Court of Queen's Bench, having resigned that office, was appointed Lord Chief Justice of the Court of Common Pleas, and sworn of Her Majesty's most Honourable Privy Council.

Sir FitzRoy Kelly and Sir Hugh M'Calmont Cairns resigned office as Attorney and Solicitor-General, and Sir Richard Bethell and Sir Henry Singer Keating were re-appointed to those offices. In the vacation after Michaelmas Term 1859, on the death of Mr. Justice Crowder, Sir H. S. Keating, Solicitor-General, was made a Judge of the Court of Common Pleas, and William Atherton, Esq., one of Her Majesty's Counsel, was appointed Solicitor-General, and afterwards received the honour of Knighthood.

In Ireland, in Trinity Term 1859, Lord Chancellor Napier resigned his office, and the Right Hon. Maziere Brady was re-appointed Lord Chancellor of Ireland.

Mr. Whiteside and Mr. Hayes, at the same time, resigned the offices of Attorney and Solicitor-General in Ireland, and Mr. Fitzgerald and Mr. Christian were re-appointed to those offices.

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ERRATA.

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- 2. Second line, head note, for *jurisdiction* read *judicature*.
- 19. In note, for 289 read 239.
- 120. Line 11, for *now* read *never*.
- 331. Thirteenth line, head note, after “cattle gates” insert comma.
- 340. In note, for Barn. & Cres. 639, read 4 Barn. & Cres. 639.
- 349. Ninth line, head note, for *owner* read *landowner*.

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upon it. The 17 & 18 *Vict.*, c. 125, s. 27, which permits in all courts of civil jurisdiction comparison of handwriting as a means of evidence was therefore adopted by the Committee.

In 1671, the Crown issued a commission to authorise the College of Heralds to receive and record the family pedigrees of all such "Benefactors," as should be willing to contribute sums of money for the rebuilding of the Heralds' College, before then destroyed in the Great Fire of London. A pedigree so furnished to the College by a member of a family, and the signature to which was proved, was received in evidence, but only as a declaration of a member of the family.

The declarations of a wife, as to the state of her husband's family, are equally admissible with the declarations of a husband as to the state of his wife's family. This admissibility does not extend to statements made by the wife's father.

If a party is admitted to oppose a claim of peerage, he must make his opening statement after the Claimant's evidence has been closed, whether the Claimant's counsel sums up or not.

The book called "Arms and Descents of the Nobility, E. 16," though produced from the Heralds' College, is not admissible in evidence, not being kept under authority of any official order, or in discharge of any official duty.

A nobleman who had the wardship of another nobleman, under a grant from the Crown, made a will. This will contained a statement of the marriage of the ward with the testator's daughter, accompanied by a direction, that in the event of the death of the ward his younger brother should marry the lady. The will was tendered in evidence to prove that the ward had a younger brother : *Qu.* Whether it was admissible.

An old "Collection of monumental inscriptions" in country churches held inadmissible to show what had been the inscription on a partly defaced tomb.

A barrister who had attended as counsel for the Claimant of a peerage during the whole of one session, was, at the commencement of the next, appointed *Attorney-General*. The Committee for Privileges allowed him to continue to act as counsel for the Claimant, and accepted the *Solicitor-General* as his representative on the part of the Crown.

Letters addressed to a lady who had married into a particular family were produced from the custody of a member of that family, who likewise possessed many other family papers and deeds, and held by descent some of the property formerly belonging to the husband of the addressee of the letters : *Held*, admissible in evidence, to

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title. The *Attorney-General* was directed to report on this petition. Her Majesty was afterwards pleased to refer the petition, together with the *Attorney-General's* report, to the House of Peers, and on the 11th *May* 1857, the House resolved that it be referred to the Committee for Privileges to consider and report thereon.

From the petition and the statements of counsel, the following appeared to be the substance of the case. The Earldom of *Shrewsbury* was created by letters patent, dated 20th *May*, 20 *Hen.* 6 (1442), in the person of *John* Baron *Talbot*, to hold to him and the heirs male of his body. The first earl died in 1453, leaving *John*, who became the second earl, his eldest son and heir. *John*, the second earl, died in 1460, leaving two sons, *John*, who became third earl, and Sir *Gilbert Talbot*, of *Grafton*. The male descendants of the third earl failed in *Edward*, the eighth earl, who died 1617-18. The peerage then went to the descendants of Sir *Gilbert* of *Grafton*. This gentleman, who was a Knight of the Garter, and died in 1517, had been twice married, first to *Elizabeth*, daughter of Lord *Graystock*, and secondly to *Ann Cotton*. By his first wife he had one son, Sir *Gilbert Talbot*, who died without male issue in 1542. By his second wife he had a son known as Sir *John* of *Albrighton* and *Grafton*, who died in 1549. This Sir *John* of *Albrighton* was twice married, first to *Margaret Troutbeck*, and secondly to *Elizabeth Wrottesley*. From his first marriage descended all the earls down to and inclusive of *Bertram Arthur*, the 17th earl, who died on 10th of *August* 1856, without male issue, and on whose death, the Petitioner alleged that the peerage vested in him, being the eldest male lineal descendant from Sir *John* of *Albrighton* by the marriage with *Elizabeth Wrottesley*.

Among the persons who formed part of this line of descent from *Margaret Troutbeck* was *Charles*, the 12th

1857.
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 The
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On the 13th *July* 1857, the Committee for Privileges assembled, Lord *Redesdale* in the chair.

Sir *F. Thesiger*, Sir *F. Kelly*, Mr. *T. F. Ellis*, and Mr. *Pauncefote* appeared as counsel for the Petitioner.

The *Attorney-General* (Sir *R. Bethell*) appeared for the Crown. In a subsequent part of the case he was assisted by Mr. *Roche*, who continued throughout to appear as an assistant to the counsel for the Crown.

Mr. Serjeant *Byles*, Mr. *Roundell Palmer*, Mr. *Fleming* and Mr. *Badeley* appeared for Lord *Edmund Howard*.

Mr. *Fleming* also appeared for the Prince and Princess *Doria Pamphili* and the Duke and Duchess of *Sora*.

Mr. *Peter Burke* (and subsequently Mr. Serjeant *Atkinson*) appeared on behalf of *William Talbot*, Esq.

Sir *F. Thesiger* opened the case for the Claimant.

After the first witness had been examined in chief,

Mr. Serjeant *Byles* submitted that, as the right to the *Shrewsbury* estates, of which the Claimant was now in possession, but of which Lord *Edmund* was the devisee, and which were annexed to the peerage, would be conclusively and irrevocably decided by the decision upon the claim of the peerage, he was entitled to cross-examine the witnesses for the Claimant, and if the Committee so directed he was prepared to lay a case on the table of the House.

The *Lord Chancellor* (Lord *Cranworth*): If the Petitioners in opposition can show that they should suffer any injustice by a resolution in favour of the claim, they may be allowed to appear and be heard. That was allowed in the *Montrose* case (a). The Earl of *Crawford* claimed the Dukedom of *Montrose* and the existing Duke of *Montrose* petitioned to be heard against the claim on the ground that

(a) Report published by Lord *Lindsey* (John Murray, Albemarle-street), 1855.

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Mr. *Fleming* likewise applied to be heard on behalf of the Princess *Doria Pamphili*, and the Duchess of *Sora*, against the claim of Earl *Talbot*, whose admission to the Earldom of *Shrewsbury* would destroy the claims of these ladies, who were the daughter and granddaughter of *John* Earl of *Shrewsbury*.

Lord *Brougham*: These two parties are clearly in the same interest in opposition. If we hear them, it must be remembered that we can only hear one counsel on a side. Here the *Attorney-General* has told us that we ought to allow these parties to appear.

Sir *F. Thesiger* feared delay, and therefore hoped that they would not be allowed to do more than lay a case before the House. That was all that was done in the *Leigh* and *Marchmont* cases. In the *Montrose* case, Lord *Campbell*, remarking that the opponent did not allege that he had any peculiar means of information, went on to say that "the case was likely to be better heard without a contradictor, leaving it in the hands of the *Attorney-General* and the noble candidate; that it would be laid before the House in a more satisfactory manner by the *Attorney-General*, and those who assisted him, than by admitting the interposition of an *amicus curiæ*" (*d*).

Mr. *P. Burke*, on behalf of Mr. *W. Talbot*, claimed to cross-examine the witnesses, although his client did not claim the peerage. He was, however, prepared to lay a case on the table, showing that he was descended from a younger brother of Sir *J. Talbot*, of *Grafton*, who, being a younger son of Sir *John* of *Albrighton* by his first marriage, would of course take precedence in descent over any of the descendants of Sir *John* of *Albrighton* by his second marriage.

(*d*) Report published by Lord *Lindsey*, Appendix, 373*.

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where it had been kept like all other visitations, having been there received as a return made under the commission.

The visitation was received.

July 14.

Mr. *T. W. King* produced a copy of a plate of the arms of the Knights of the Garter from the Chapel Royal at *Windsor*. He had himself made the copy. The plate was put on by screws, and was removable.

Mr. Serjeant *Byles* objected, that as it was removable, it ought to have been produced.

The *Witness*: It cannot be removed without the *Queen's* warrant. The plates have remained there from the time of *Henry 5*, when they were first put up.

Sir *F. Kelly* was heard in answer to the objection.

The Committee was of opinion that the copy was admissible. The other side might, if they could, impeach it, and then it would be for the Committee to take such means as might be deemed fit for the purpose of removing any doubt as to its authenticity.

Copy of the plate admitted.

Mr. *Sharpe*, assistant keeper of the records at the Record Office in *London*, produced an inquisition of the 34 *H. 8*, to prove that Sir *Gilbert* of *Grafton* had only two sons, *Gilbert*, upon whose death the inquisition was held, and *John*: the former by his first marriage, the latter by his second marriage.

The Committee asked if any one appeared for Major *W. Talbot* to contest this evidence?

No one answered.

The Committee intimated that Major *Talbot's* counsel would not be allowed at any future stage of the proceedings to recall and cross-examine this witness (*g*).

(*g*) The counsel for Major *Talbot* did not regularly attend the Committee, and did not therefore avail themselves of the privilege

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Mr. Serjeant *Byles* submitted that the original ought to be produced. It appeared that when a copy was taken, the original was returned to the executors. A copy had been taken here; the original, therefore, must have been returned, and ought to be in the possession of the family, and therefore ought to be produced.

Sir *F. Kelly* referred to the case of the *Braye* Peerage (*h*), where, under similar circumstances, a copy of the will of Sir *R. Peckham* had been admitted.

The Committee was of opinion that, under the circumstances stated in the evidence, the presumption was that the will had been returned to the executors or devisees, and must have come from them to the parties who now opposed this claim; and as they did not object that no notice to produce had been served, and did not produce the original, the copy was admissible. Here, too, the copy was brought from the office of deposit by the proper officer.

The copy of the will was admitted and read. On a subsequent day, under similar circumstances, the registered copy of the will of Dame *Elizabeth Talbot*, 6 May 1559, was admitted.

The Act of Parliament, 6 *Geo.* 1, c. 29 (1719), "for annexing the late Duke of *Shrewsbury*'s estate to the earldom of *Shrewsbury*, and confirming *Gilbert* Earl of *Shrewsbury*'s settlement," &c., was put in and read. The Judges' report on the Bill, which terminated in this Act, was read. The two Judges (*Bland* and *Page*) certified "that *Gilbert*, Earl of *Shrewsbury*, *George Talbot*, *Mary Talbot*, *John Talbot*, *William* Lord Bishop of *Salisbury*, and *Charles Talbot*, are all the persons that appear to us to be concerned in the consequences of the said Bill."

(*h*) 6 Clark & F. 757-767. See also *Fitzwalter* Peerage, 10 Clark & F. 946. 952.

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Lord *Wensleydale* asked whether this register had been deposited at the office of the Registrar-general.

The witness answered in the negative ; but it appearing that he himself had performed the burial service, his evidence was admitted.

The 1 *Geo.* 4, c. xl., 6 & 7 *Vict.* c. xxviii., and 13 & 14 *Vict.* c. vi., reciting the deaths of several persons, were then proffered in evidence and admitted without objection.

The Rev. *William Johnson* subsequently produced the registry of burials kept at St. *Joseph's* Roman Catholic chapel, *Bristol*. This was entered at the office of the Registrar-general. It was admitted.

Sir *F. Kelly* proposed, with a view to show relationship, to offer in evidence a book called the Benefactors' Pedigree.

Mr. *Sharpe* produced from the General Record Office the record of a commission to Garter King at Arms and others, dated 6 *September* 1671, empowering the commissioners to raise a fund for the rebuilding of the *Heralds' College*, which had been destroyed in the Great Fire, and for that purpose to enrol the pedigrees of parties who were willing to become "benefactors" by subscribing money for rebuilding the college.

The commission was read.

Mr. *Netherclift*, lithographer and fac-similist to the British Museum, skilled in ancient handwriting, and in comparison of handwriting, was shown the signature "*G. Talbot*" to the original will of Sir *Gilbert Talbot*, dated 5 *April* 1695, as to the authenticity of which there was no doubt, and then a signature "*G. Talbot*" affixed to the Benefactors' Pedigree, and pronounced them to be written by the same person.

Mr. Serjeant *Byles* objected that handwriting could not be

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The *Lord Chancellor*: Where the Legislature has said, that a particular rule of evidence is to be adopted in "every court of civil judicature," if that rule is in itself convenient, it would be strange for us to refuse to adopt it, simply because the words of the Act are not binding upon us.

Lord *St. Leonards*: I entirely agree. The provision in the statute does not apply to this House; for, strictly speaking, we are not a court of civil judicature. But here is a rule of evidence adopted for the purposes of the public good. If there was a good reason shown why we should not adopt it, we would not do so, but would make a rule of our own for the purpose of greater care and caution. But that is not so, and there is nothing to induce this House, sitting in Committee for Privileges to inquire into a peerage, to disregard a rule of evidence which, in its legislative capacity, it has established as a rule of evidence good for all courts of justice.

Lord *Wensleydale* concurred.

The pedigree of the *Talbot* family in the Benefactors' Book was then produced.

Mr. *Netherclift* and Mr. *H. Adlard* were then examined on the question of the identity of the writing in the will and in the Benefactors' Pedigree, and declared their belief, after careful comparison of the two, that they were both written by the same person.

Sir *F. Kelly* tendered in evidence the Benefactors' Pedigree. It had been received in the *De Ros* claim in 1804.

Mr. Serjeant *Byles* objected to its reception. It cannot be treated as an official document. It is not like a commission or a visitation. The Heralds' College is merely a branch of the Earl Marshal's Office, but it is not a court of record, and cannot imprison, either for refusing to give evidence, or for giving false evidence. A statement made

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value not to be attributed to mere voluntary statements sent in as this had been, and received by the Herald's College merely because the person who sent it in accompanied it with a subscription to rebuild the college. That standing order had, besides, been recognised on a subsequent occasion by the *Irish* House of Lords, and another resolution passed that it should be complied with (*m*): such a document might, therefore, be said to have been drawn up under authority; but even that was rejected by a Committee of this House in the *Athenry* case (*n*). Then it will be said that it is admissible as a declaration of pedigree, made by a member of the family; if so, then comes the question, whether it ought not to be produced from family custody, and whether it is not inadmissible for being made

such lord or lady, with the matches and issues of their family." This resolution appears to have been adopted on considering the petition of *Wm. Hawkins*, Esq., Ulster King of Arms, setting forth his reasons for not making the lists of the Lords complete, and praying that the House would make order to enable him to do it for the future. This petition was presented 22d *July* 1707, and referred to a Committee. The Committee reported the above resolution, and it was forthwith adopted, and made a standing order of the House.

(*m*) On the 12th *December* 1715, there was a call for defaulters, and the Earl of *Carlingford* was ordered to attend at the next sitting.

That next sitting was on *Wednesday*, 14th *December* 1715. The earl then attended, and as his excuse produced his writ, which was directed to "*Nicholas*," whereas his name was "*Theobald*." "And the House being informed that the said mistake proceeded from the return made by the King of Arms to the clerk of the Hanaper of the list of peers of this kingdom, in order to make out their several writs; but it appearing to the House, by an orders of the 12th of *August* 1707, which was read by the clerk, whereby it appeared that 'it is the opinion, &c.' [Here the order is set out.] Whereupon it was ordered that the resolutions of this House of the 12th of *August* 1707, be and are hereby to be complied with by all persons concerned therein."

(*n*) Minutes of Evidence *Athenry* Peerage, p. 87.

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Sir *F. Kelly*, in reply, relied on its having been admitted in the *De Ros* case. It was made before 1677, before any discussion which led to the settlement in 1719, and was plainly admissible as a declaration signed by a member of the family, and now brought from the proper custody.

The *Lord Chancellor*: The result of my strong conviction is, that leaving open all questions as to the weight of this document, it is receivable in evidence. It was made *ante litem motam*, by a member of the family, and is proved to have been signed by him. It is therefore admissible as a statement made by a member of the family as to what was then the state of the family. Being so, that, in truth, brings the question now raised to a close, and it is not necessary to say whether, if this evidence of handwriting had not been produced, the statement would have been admissible. This pedigree certainly does not stand on the footing of a Heralds' visitation, for that is a document made upon authority, and with means of investigation, and it is the right and duty of the persons who make these visitations to inquire, and to report the result of their inquiries. But it is clearly a declaration of the state of the family, made by a member of the family, and, as such, received and preserved at the Heralds' College, and being so, and from the Heralds' College presented to us, even if the signature had not been proved, it would have been receivable in evidence.

Lord *Brougham*: I entirely agree that, reserving all observations on the document itself and its value, it is on either of these grounds receivable in evidence. I think that the signature to the pedigree is proved; but even if that had not been so, there is evidence that the parties who had authority to receive and enrol family pedigrees did so. It must have been some member of the family who took the pedigree to be enrolled. Every one would not have

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making the statement were not the subjects of the Crown, which issued the Commission to the persons by whom the statements were receivable.

The pedigree was received in evidence.

A record of a Royal Warrant, dated 31st *December*, 1630, granting precedence, as an earl's son, to *George Talbot*, was produced from the Heralds' Office, and tendered in evidence.

It was objected that the original ought to be produced.

Evidence was given to show that search for the original had been made at the Home Office, and at the State Paper Office, but that it could not be found; and that ordinarily such warrants, after being recorded at the Heralds' Office, were returned to the grantee.

It was admitted.

An examined copy of an inscription on a monument in the parish church of *Kinver*, erected to the memory of *William Talbot*, describing him as the father of the Bishop, was tendered in evidence. It was erected in 1724.

Mr. Serjeant *Byles* and Mr. *R. Palmer* were heard in objection to it. The contest as to the right of succession in the family existed in 1719, and the Parliament had got rid of the matter by passing an Act, which settled the property in a certain manner, but left open the question of family succession. This monument was erected *post litem motam*, and the inscription on it is on that ground inadmissible. In the *Berkeley* peerage case it was held, that it was not necessary that a litigation should absolutely have been commenced, but that it was enough if the matter was in controversy, so that litigation might reasonably be apprehended.

Lord *Brougham*: Was any question then raised whether the Bishop was the son of *William Talbot*?

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The evidence was admitted. It was afterwards stated that Lady *Shrewsbury* was herself, by birth, a member of the *Talbot* family.

July 27. Sir *F. Kelly* proposed to sum up.

The Committee said, that as the evidence had so recently been given, there was no necessity for summing up; but that the learned counsel had the right to do so, if he deemed it proper.

Sir *F. Kelly* thereon expressed his willingness to abstain from summing up, the more especially as the Claimant would have the final reply.

Mr. Serjeant *Byles* was then called on. He, at first, objected to make his statement of his case, except after the summing up of the claimant; but as the Committee intimated that he must make his opening statement then, or he would lose his opportunity to do so at all, he addressed their Lordships on behalf of the petitioner in opposition to the claim.

July 28. The opposing Petitioner entered upon his evidence.

Mr. *Courthorpe*, from the Heralds' College, produced a book kept there, marked "E. 16," and professing to contain "Arms and Descents of the Nobility."

Sir *F. Thesiger* objected to its reception in evidence, on the ground that there was no proof of its bearing any authoritative character.

The witness stated, that he had no knowledge of its being compiled under any commission, or other authority. It was compiled in 1616 and 1617. There were many such books preserved in the College; the Heralds kept them; they were made up of entries distinct from the records.

Sir *F. Thesiger*: It is stated that this book was received

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Lord *Wensleydale* did not know that it had been precisely determined that the statements of a wife were admissible. It was not necessary to be decided the other day, for there the wife was by birth a member of the family.

Lord *Brougham* was of opinion that it had been so decided. There could be no doubt whatever that the wife's declarations as to the state of her husband's family were admissible in evidence, as his with respect to the state of her family certainly were. There was not the slightest distinction in principle between the two cases.

Lord *St. Leonards* concurred.

Mr. *R. Palmer* submitted that this will was admissible in another way. It was an act done with reference to *George*, Earl of *Shrewsbury*, whose wardship the will showed to have been granted to the testator (*u*), and the will disposed of the ward.

Sir *F. Thesiger*: If the testator's declaration is not in itself admissible, an act accompanying it will not make it admissible.

Lord *Wensleydale*: If the wardship is relied on, it must be proved in some other way. The mere statement of it in the will is not sufficient.

Mr. Serjeant *Byles*: The will contains more than a mere recital; it is an act; it is a devise of the ward; it is an act of wardship.

Lord *St. Leonards*: A devise of a married woman?

The will was withdrawn for the present.

(*u*) The words of the will were: "Also whereas *George* Erle of *Shrewesbury*, whos warde and marriage to me ys granted by the Kinge's lrs patents, hath married *Anne* my daughter, I will that, yef the same erle dye, as God defende, before any carnall knowlich, betweene the same erle and hir had, that than *Thomas*, brother to the same erle take to wyff the same *Anne*, if the law of the Chirch will suffre or licence ytt."

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The visitation was, on that undertaking, admitted *de bene esse*.

After some evidence had been given by the opponents of the claim,

Mr. Serjeant *Byles* applied for an extension of the time, on the ground that there had not been sufficient time to obtain all the evidence, which, he believed, he should be able to procure on this subject.

Mr. *Peter Burke*, on behalf of Mr. *William Talbot*, made similar observations; and added, that if allowed time till the commencement of the next session, he should then be fully prepared to lay his case before the Committee.

Sir *F. Thesiger* objected to farther delay.

The *Attorney-General* said that he must have time to examine the evidence before he should be in a situation to give his advice to the Committee upon it.

Sir *F. Thesiger* could not object to that.

The Committee adjourned for one week.

August 6. Some farther evidence was given in opposition to the claim. Mr. *Roundell Palmer* then began to sum up the case on the part of Lord *Edmund Howard*.

August 7. Mr. *Palmer* continued and concluded his summing up.
 Sir *F. Kelly* was heard to reply on behalf of the claimant.

August 10. Sir *F. Kelly* resumed and concluded his summing up.

August 11. Some farther evidence was produced, and Sir *F. Thesiger* and Mr. Serjeant *Byles* were respectively allowed to address the House upon it.

August 14. The *Attorney-General* was heard to observe upon the whole case on the part of the Crown, and remarking that it is left doubtful whether Sir *John of Albrighton* had not more than one son by his marriage with *Margaret Troutbeck*, and that the inscription on the tomb in *Broomsgrove*

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Badeley were counsel for Lord *Edmund Bernard Fitzalan Howard* in opposition; Mr *Fleming* and Mr. *Bowyer* appeared for the Prince and Princess *Doria Pamphili* and the *Duchess of Sora* in opposition.

Mr. *Burke* appeared for *W. Talbot*, Esq.

The *Solicitor-General* (Sir *H. Cairns*) and Mr. *Roche* appeared for the Crown.

The *Attorney-General* was then heard to open the evidence which he was prepared to give in order to clear up the matters which at the close of last session had been deemed to require further investigation. He also stated that he should give some additional evidence to strengthen that which he had already laid before the Committee.

April 22.

The *Attorney-General* submitted that, as Major *Talbot* had not laid any case on his own behalf upon the table of the House, he had not complied with the direction of the Committee, given at the close of the last Session, and must therefore be considered as no longer entitled to appear at the Bar of the House.

Mr. *Burke* asked for farther indulgence, suggesting that at the close of Lord *Edmund Howard's* fresh evidence, if any should be given, he should be prepared to state the exact position of Major *Talbot*.

The Chairman said that the Committee could not grant farther indulgence. The condition on which Major *Talbot*, who said he was a Claimant in opposition, had been allowed to appear at the Bar, and take any part in the inquiry, had not been complied with. He had not laid any case on the table of the House: if he could do so, he might make a fresh application to the Committee to be allowed to be heard.

The burial certificate of "*Frances*, the wife of *Samuel Jewkes*, Esq., and daughter of *William Talbot*, of *Storton*

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Meath v. The Marquis of Winchester, that might be sufficient. But here the witness could hardly be called a descendant of the Mrs. *Jewkes*, who was said to be daughter of the *Talbots*.

The witness stated that there were in his possession other letters to the same person, and deeds of property which had come to him from *Samuel Jewkes*.

The *Solicitor-General* did not think, considering the facts proved by the witness, that this could be said to be an unnatural or an improper custody for this document, and he did not, therefore, oppose its admission in evidence.

The Committee thought the letter admissible. Other letters to the same person, from the Duke of *Shrewsbury*, were also produced by the witness, and admitted in evidence.

A bill and answer, brought from the Rolls Office in *Dublin*, in a suit of *Edgworth v. Talbot*, were tendered in evidence.

Sir *R. Bethell* objected, that the answer did not appear to be signed by the Defendant. It could not have been received without signature and the oath of the Defendant, except upon an order of the Court, and no such order had been proved.

The *Solicitor-general* pointed out, that it was indorsed, "I consent that this answer be received without oath. 2 July 1713. *Ja. Darby*," who was the Plaintiff in the suit.

Sir *R. Bethell*: The objection is not removed. *Darby* was the next friend of the Plaintiffs who were minors. His consent was not sufficient to make it evidence.

Lord *Wensleysdale*: It must be received as the statement of the party making it; and being found upon the files of the Court, it must be presumed that it got there by proper authority.

Evidence received.

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was allowed to be heard in opposition. Major *Talbot* did not claim the peerage nor the estate; and if he did, he could not now be heard, except after laying his claim before the Crown, and coming before the House in a regular way. He had not, therefore, any title at all to be heard.

May 6. Mr. *Burke* attempted to renew his claim to be heard, but was refused by the Committee as before. From this time the counsel for Major *Talbot* ceased to appear.

Sir *R. Bethell* was then farther heard on the additional evidence.

Farther evidence as to the state of the tomb in the church at *Bromsgrove* was given.

May 14. Evidence was given on behalf both of the Claimant and of Lord *Edward Howard*.

A visitation of the county of *Northampton*, dated in 1681, 1682, was tendered in evidence. There had been search made for the commission under which it was taken, but none could be found. The visitation purported on the face of it to have been taken by *Chester* and *Rougedragon* heralds "by virtue of several deputations from Sir *Henry St. George*, Kt., Clarenceux King of Arms." The deputation was read; it began, "To all to whom these presents shall come, Sir *Henry St. George*, Kt., Clarenceux King of Arms, &c.;" it then went on to recite the commission to Sir *Henry St. George*, which was to be executed "by himself or his sufficient deputy or deputies, under the seal of his office, deputed and authorised to visit all the said province." The visitation was signed by Sir *Henry St. George*.

Upon this the visitation was admitted in evidence.

Mr. *R. Palmer* was partly heard to sum up the additional evidence on the part of the opposition.

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Sir *Thomas Samwell*, Bart., of *Upton*, in the county of *Northampton* (who will, for convenience' sake, be afterwards described as Sir *Thomas*, the grandfather) was twice married. By his first wife he had one son, *Thomas*, and a daughter, *Mary*. *Thomas* succeeded him in the title, and will be described as Sir *Thomas*, the testator. *Mary* married *Stephen Langham*, and had issue, three daughters, *Millicent*, *Frances Ann*, and *Phillis*. *Millicent Langham* married *William Drought*, and had issue, *Thomas Fuller Drought*, *Frances Drought*, and *Juliana Drought*. *Frances Ann Langham* and *Phillis Langham* were never married. They were the testatrixes, whose wills were the subject of discussion.

Sir *Thomas*, the grandfather, had, by his second wife, *Mary*, the daughter of Sir *Gilbert Clarke*, a son, *Wenman* (who succeeded to the title on the death, without issue, of his half-brother, *Thomas*), and a daughter, *Catherine*. This daughter married *Thomas Atherton Watson*, and had three sons and one daughter. The sons were *Thomas Samwell Watson*, *Wenman Langham Watson*, and *Atherton Watson*. The daughter, *Charlotte Felicia*, married *Benjamin Tinley*, and had issue, two daughters, *Clarissa Felicia Tinley* and *Charlotte Henrietta Tinley*. The former married a Mr. *Woodford*, and left issue, *Wenman Langham Woodford*, one of the Respondents; the latter married *William Wright*, the other Respondent.

Sir *Thomas*, the testator, had no lawful issue, and by his will, dated *November 1st*, 1778, devised the estates (which were subject to terms still unsatisfied and outstanding) to his illegitimate son, for life, with remainder to the sons of his said son in tail male, with remainder to *Wenman Samwell*, the testator's brother of the half-blood, for life, with remainder to his sons in tail male, with remainder to *Thomas Samwell Watson*, a son of *Catherine*,

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first instance, to her sister for life; then to trustees, “in trust, for my two nieces, *Frances Drought* and *Juliana Drought*, daughters of my late sister, *Millicent Drought*, for and during their lives, and the longest liver of them. And, from and after both their deceases, for all and every the child and children of my said nieces, and the daughter and daughters of my nephew, *Thomas Fuller Drought*, equally between them, share and share alike,” &c. After certain other provisions, unnecessary to mention, the will concluded thus:—“And for default of all such issue, then upon trust for the right heirs of my grandfather, Sir *Thomas Samwell*, Baronet, deceased (the father of my late uncle, Sir *Thomas Samwell*, by *Mary*, his second wife, also deceased, who was the daughter of Sir *Gilbert Clarke*, Knight, for ever.”

Phillis Langham died in 1828 and *Frances Ann Langham* in 1830; *Juliana Drought* died in 1845; and *Frances Drought* in 1849; all of them without ever having been married.

Colonel *Samwell* (the second tenant for life under the will of Sir *Thomas*, the testator) made a will by which he devised all his estates whatsoever, &c., to his wife. He died in 1831, and his widow devised all her estates to *Emily Vernon*, under whom the Appellant now claimed.

Thomas Fuller Drought, the last of the persons named as tenants for life in the will of Sir *Thomas*, the testator, died in 1843, without issue, and the *Samwell* estates then devolved upon *Atherton Watson* (who had not been named in the will) as right heir of Sir *Samwell*, the testator; and, on his death, without issue, in 1851, the question arose as to the construction to be given to the ultimate limitation in the wills of *Frances Ann* and *Phillis Langham*, whose title to their undivided two-third shares of the property had then taken effect in possession.

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designatio personæ, and operate only as words of description. They denote a special heir, and if not accompanied with words of limitation, would have no other effect. So considering them, Colonel *Samwell* would only have taken an estate for life. But secondly, assuming them to be words of description not only of the person, but of the quantity of the estate, so that the estate would, if they stood alone, be only an estate tail, yet the added words “for ever” control and give a sense to the other words, and so convert an estate tail into an estate in fee simple.

The *Vice-Chancellor* thought that this case could not be distinguished from *Mandeville’s* case (*b*), for that here, as there, a special entail was created. But that case even if admitted to be good law, and it has been questioned by *Fearne* (*c*), *Gilbert* (*d*), and *Jarman* (*e*), cannot govern the present; for there the words described the heir of the whole descendible blood, the general heir; whereas here the words describe a special heir. In this case, therefore, the person to take would be that person who, at the deaths of the testatrixes, answered the special description of “right heir of Sir *Thomas Samwell*, the testatrixes’ grandfather by *Mary*, his second wife;” and he would take, by mere description, the added words “for ever” denoting the quality of the estate taken. The early cases established that where there is a special description attached to the word “heir,” the person to take must answer the whole description: *Cownden v. Clark* (*f*), *Ashenhurst’s* case (*g*). Here Colonel *Samwell* did fulfil all the terms of the description; by that description he took, and the estate he took was by the words “for ever” made an estate in fee-simple, and the person thus designated may take by pur-

(*b*) Co. Lit. 26 b.

(*c*) Contingent Rem. 80, 83.

(*d*) Uses: by *Sugden*, 37 n.

(*e*) Vol. ii., p. 7.

(*f*) Moor, 860, pl. 1181.

(*g*) Hob. 34; 2 Ro. Ab. F. pl. 5.

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that it was not present to the minds of the judges, and as the part of the Institute where that case is set forth was referred to, it must be assumed that case was under consideration. It must therefore be taken that the more recent is the more authoritative exposition of the law. But assuming, as the *Vice-Chancellor* did, that the more recent was not in derogation of the more early case, then it is submitted that the words "for ever" create a distinction between *Mandeville's* case and the present, and have the effect of creating a fee simple in the disposition of the *Samwell* estates in favour of the person who at the death of the testatrixes answered the special description given in their wills.

Mr. *Glasse* and Mr. *Anderson* (Mr. *Smythe* and Mr. *Surrage* were with them) for the Respondent, *Wright* :

In this case an estate tail is given by the terms of the will, *Mandeville's* case (*l*), which is not affected by the decision in *Roe v. Quartley*; and in no such case is such an estate allowed to be enlarged to a fee simple by mere implication (Cooper 341). In *Roe v. Quartley* (*m*), the first gift was in fee, the heirs of the bodies of *A.* and *B.*, or of the body of *A.* by *B.*, such a devisee must be the heir of the body of each and of both (*n*), and it is not necessary to use the words "of the body" in such case. In *Roe v. Quartley*, nothing turned on the introduction of the words "for ever." The cases of *Luddington v. Kime* (*o*), and *Heath v. Heath* (*p*), have no bearing on the present, nor has the doctrine quoted from *Montgomery v. Montgomery* (*q*); for no one doubts the general rule as to

(*l*) Co. Lit. 26 b.

(*m*) 1 T. R. 630.

(*n*) Com. Dig. Estate, B. 3.

Co. Lit. 20 b.

(*o*) 1 Lord Raym. 203.

(*p*) 1 Bro. C. C. 147.

(*q*) 3 Jo. & Lat. 47.

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heir in the singular number has sometimes the same effect as the word heirs in the plural ; but if words of limitation are superadded to the word heir, it is considered as conclusively showing that the word is used as a word of purchase. When that is not the case, it is considered in construing wills as *nomen collectivum*, for the purpose of creating an estate tail in the first taker, and not as creating an estate tail in the person answering the description of heir. If the word " heir " would *per se* give an estate of inheritance to the person answering the description, there would be no reason for any distinction whether words of limitation or inheritance were or were not superadded."

It is not open to the Respondent to complain of the form of the decree. If a petition is presented for a re-hearing, the whole decree is open ; but that is not so on an appeal. The Respondent should have presented a cross appeal, and thus have given the Appellant the power of answering him.

As to the costs they are matter of discretion.

The Lord Chancellor :

My Lords, as regards this latter point which has been argued, as to whether the decree is right in having directed an account only from the time of the filing of the bill, that is a matter which we will not trouble the learned Judges to consider. I confess I am rather startled by the generality of the proposition, that in an appeal to this House, everything that is made the subject of objection on the other side is open to the Respondent, although he has not presented a petition of appeal. Although that seems to be a course that might save expense in a particular case, I am not clear that as a general proposition, it might not involve the parties in more expense. But, however, upon that I give no opinion at present. I do not think, that the analogy of proceedings

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Samwell, Bart., deceased, the father of my late uncle, Sir *Thomas Samwell*, by *Mary* his second wife, also deceased, who was daughter of Sir *Gilbert Clarke*, Knt., for ever." I consider these devises as if the devise had been to the heirs of the body of Sir *Thomas Samwell*, in lieu of the words "right heirs of Sir *Thomas Samwell* by *Mary* his second wife," which is in truth to the heirs of both their bodies.

And this brings it, in my opinion, within *Mandeville's* case (*v*) recognised by Mr. Justice *Taunton* in *Winter v. Perratt* (*x*). That case has remained as law for centuries, and is, in my opinion, good law. The addition of the words "for ever" at the end of the devise does not, in my opinion, enlarge the estate tail in the first taker to an estate in fee: *Doe d. Cander v. Smith* (*y*). The case of *Doe v. Quartley* (*z*), does not clash with *Mandeville's* case, and therefore I am of opinion that *Charlotte Henrietta Wright* would have taken on the decease of *Atherton Watson* an estate tail in the lands in question.

Mr. Justice *Willes*:

Mr. Justice
 WILLES.

My Lords, I am inclined to think that the estate would be in fee simple. I do not see by what other construction effect can be given to all the words of the will, and I think effect may be given to them all by adopting that construction. The words of description, I mean the words preceding the words "for ever," are ambiguous, and may be read either as a designation of the person or persons to take, and a limitation of the estate as one to go *quasi* by descent through all the persons who might from time to time, so long as any might exist, successively become such special heirs as described, or, simply, as a designation of the person

(*v*) Co. Lit. 26 b.

(*x*) 9 Clark & F. 615.

(*y*) 7 T. R. 521.

(*z*) 1 T. R. 630.

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the principle of *Mandeville's* case, and that, consequently, Colonel *Samwell* only took an estate tail; the Appellants, on the contrary, contending that the case at bar was not at all affected by *Mandeville's* case, and that the devise in question gave an estate in fee to Colonel *Samwell*. I am of opinion that the Respondents are right in their construction of the devise, and that the case before your Lordships is governed by the rule established in *Mandeville's* case. That case was admitted to be law by the Appellants' counsel. But they made two points: first, that the rule in *Mandeville's* case did not apply, because this devise was to a person as right heir, who was not the general heir of his father; the issue by the second marriage not answering the description of general heirs, where there had been issue by the first marriage. And a distinction was taken between the effect to be ascribed to the words "heirs of the body," when such heirs were the ancestor's general heirs, as in *Mandeville's* case, and the effect to be ascribed to the same words, where the word "heirs" did not include the general heirs, as in the devise in question.

Secondly, assuming the same meaning to attach to the words "heirs of the body" whether general heirs or not, that the double effect given to those words, of designating the first taker, and showing the course of devolution of the estate, is controlled by the final words in the clause "for ever," which amounts to a limitation in fee.

It was deduced from the first proposition, that the gift to the heirs of the grandfather by his second wife was a *designatio personæ*, and nothing more, and could only give an estate for life, without the concluding words "for ever," which carried the fee. The second proposition assumes, that by the application of the rule in *Mandeville's* case, an estate tail would have vested in Colonel *Samwell*, if the

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Roe v. Quartley, however, has been cited as an authority, showing that the words “for ever,” when superadded to words otherwise limiting an estate tail, will carry the fee. Now with respect to that case it may be observed, that neither in the marginal note by the reporters, nor throughout the argument by either counsel, nor in the judgment of the Court, are the words “for ever” referred to. But on the contrary, it seems to have been assumed by the opposing counsel as well as by the Court, that the devise carried the fee, without the addition of these words. Mr. Justice *Ashurst* in judgment says (1 T. R. 634), “We are of opinion that *Hester* took the *whole*, not by way of limitation, but as a purchaser, and under the description of right heir of *William* and *Mary*, in the same manner as she would have done if the limitation had been to the right heir of the body of *William* and *Mary*.” That is, she takes the *whole* by purchase, and not a part only, as she would have taken the whole, and not a part only, if the limitation had been to the “right heir of the body of *William* and *Mary*.”

This seems to me, therefore, to be no authority binding upon us, that where the words of a devise without the words “for ever” would, according to the rule in *Mandeville’s* case, give a *quasi* estate tail to the parent, the addition of these words converts it into a fee simple in the first taker. Although *Mandeville’s* case was (in fact though not in form) referred to in *Roe d. Nightingale v. Quartley*, for the simple proposition that, under the latter clause of the devise, *Hester* took as a purchaser, there does not appear to have been any farther discussion upon it; and certainly no distinction was attempted to be drawn between it and the case then at bar, by reason of the additional words “for ever.” I may also observe, in conclusion, that it appears clearly to me to have been the intention of the testatrix to exhaust all the descendants of her grandfather

by his second wife; which intention would be entirely frustrated by Colonel *Samwell's* taking the fee. Therefore, upon the assumptions made in your Lordships' question, as propounded to us, I am of opinion that *Charlotte Henrietta Wright* would have taken, on the decease of *Atherton Watson*, an estate tail in the lands in question.

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Mr. Justice *Crompton*:

My Lords, I think that the devise in this case to the right heirs of the deceased baronet by *Mary* his second wife, also deceased, ought to be construed as creating an estate tail of that peculiar nature which was held in *Mandeville's* case to arise, in order that the statute of *De donis* might be carried out, and the will of the donor observed.

Mr. Justice
 CROMPTON.

The law with regard to this species of estate having been so long regarded as settled by *Mandeville's* case, it would be improper for me to suppose that your Lordships are likely to disturb it; and the question must be, how far it is applicable to the case at your Lordships' bar?

I see no reason whatever for saying that *Mandeville's* case does not govern the present, on the ground that the party to take in the first instance is not the heir general as well as special. It is now settled that the doctrine by which in some cases the party claiming as special heir is required to make out that he is heir general as well as that he answers the particular description of heir, does not apply to cases of special estates tail, and I do not see why it should apply to the peculiar estate tail in the present case, any more than to any other estate in tail special.

Treating the present case as without the words "for ever," it appears to come distinctly within *Mandeville's* case. It is the case of a limitation to the right heirs of a deceased person by a specified wife, also deceased. There are words of inheritance, "the right heirs of Sir *Thomas Samwell*,"

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and the heirs are to be his heirs “*by* his deceased wife,” which words are clearly words of procreation, and show the body from whom the issue are to proceed. This, unexplained by other words, is clearly an estate tail.

But it is said that the words “for ever” qualify the other words, and that, taken altogether, the words show that the expression “right heirs,” &c., is to be taken as a *designatio personæ*, and that the words “for ever” give the fee.

I think, however, that we must read the words exactly as if they had been “the heirs of the body of Sir *Thomas Samwell* on the body of *Mary* begotten,” and then that the words “for ever” have no effect in enlarging what would otherwise be an estate tail into a fee. If the words were inconsistent with an estate tail, they might possibly so qualify the preceding limitation; but they are words not uncommonly found following a limitation to heirs of the body, and are not regarded in point of law as inconsistent with an inheritance in tail, as they may well mean in that line out of that body for ever. They seem to me in the present case to point to the continuance of the line and race. They seem to mean that the estate shall go on in that special line of descendants of Sir *Thomas*, and shall go, not only in one particular case to one particular descendant, but in that line as long as it exists; not, as might be argued, as a mere *designatio personæ*, but for ever in that line.

It is quite true that a devise of land to “*A. B.* for ever” will give him an estate in fee simple. I apprehend that this is because the words “his heirs” must be implied. “To a man for ever” would be nonsense if it did not mean to his heirs for ever; and therefore the limitation is taken as if his heirs were really inserted; and there being no words pointing to any particular body, the inheritance cannot be in tail, but must be in fee simple. That cannot,

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Thomas Samwell by his wife *Mary*; and if he had been alive and had had a preceding estate of freehold, the estate tail would most clearly have vested in him, and descended to the heirs of his body by that wife.

The present case seems to me to point much more clearly to the descent to a particular line of the ancestor's heirs by a particular wife, than can be said to have been the case in *Roe v. Quartley*; and whatever was the exact ground of decision in that case, I cannot regard it as any authority for saying that *Mandeville's* case is not applicable to a case like the present; or that the addition of the words "for ever" can have the operation of converting into a fee what would otherwise be a clear estate tail of the nature of that in *Mandeville's* case. If any such doctrine had been laid down, I should have thought it wrong; but I agree with the observations of the *Vice-Chancellor*, that the present case is not affected by *Roe v. Quartley*; and concurring also with what appears to me his very able judgment on the point in question, I think that the estate limited to the heirs of Sir *Thomas Samwell* by *Mary* his wife, and which afterwards vested in Colonel *Samwell*, was an estate tail, and not an estate in fee simple. I answer your Lordships' question, therefore, by saying that, assuming the facts we are desired to assume, *Charlotte Henrietta Wright* would, in my opinion, have taken on the decease of *Atherton Watson*, an estate in fee tail in one-half of the one-third of the lands under each will.

Mr. Justice *Coleridge*:

Mr. Justice
COLERIDGE.

In answer to your Lordships' question, I have to state, that in my opinion, on the assumption there made, *Charlotte Henrietta Wright*, the late wife of the Respondent *William Wright*, would have taken on the decease of

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may be given ; the first, that no question was raised as to the nature of the estate created by the ultimate limitation, whether fee or tail ; the second, and a more satisfactory one, that under the first limitation an express estate tail had been given to *Hester* ; and the words of the last limitation were to be construed with reference to this. To hold that they gave her an estate tail only would have deprived them of all operation, and it was not necessary so to hold, for the same person might be right heir both of *Walter* and of *Mary*, and yet not heir of their bodies ; and therefore the construction of this devise, that it passed an estate in fee, seems to have been assumed ; and the language of the Court ought to be read thus : “ *Hester* takes the *whole* subject matter devised as purchaser *in fee*, under the description of right heir of *Walter* and *Mary*, exactly as she would have taken the *whole in tail* if the limitation had been to the right heir of the body of *Walter* and *Mary*.” It will be obvious to any one who reads the case with attention, that the only points considered were, Did she take under this limitation as purchaser ? Did she take the whole or part only ?

In my opinion, therefore, it is not important to examine whether *Mandeville*’s case was brought under the consideration of the Court in *Roe v. Quartley*. In the argument before the House it was assumed that it had been, and that the *Vice-Chancellor* was wrong in his judgment in the Court below, in saying that it had not. Upon examination, I venture to think that assumption a hasty one, founded only on the circumstance that the *page* in 1st Coke’s Institutes, in which *Mandeville*’s case is abstracted, is referred to ; but if the two other references which accompany this be looked at, it is by no means clear that the part of the page in which *Mandeville*’s case is abstracted, was the part to which this reference applies. Be this as it

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or devise can be effectuated. In such a grant or devise there can be no doubt that the intent was, that all the heirs of the body should in succession take; in *Mandeville's* case, that both *John* and *Maud* should take, the latter in case the former should die without issue, or the issue should fail; in the present case, that not merely the right heir, when the limitation over should take effect, but all right heirs answering the description in succession, if the first should die without issue, or the issue fail. But if it can be held that the whole force of the gift or devise be spent when any one right heir has taken, because he takes by purchase, that intent will obviously in numberless cases be defeated.

I make these remarks because I think they serve to place *Mandeville's* case on its proper footing. Technically considered, it may be anomalous, but in substance it was a vigorous effort at a very early period to effectuate the intention of the donor, in spite of technical difficulties. Now this, I apprehend, in all cases merely of *construction*, and where we are not met by legal impediments, is the governing rule of modern decisions.

With this remark I come to the consideration of the two words much relied on to distinguish the present case from *Mandeville's*, “for ever.” The question then is, will the addition of these words turn a limitation, which, without them would indisputably have created a tenancy in special tail, into an estate in fee; and this, be it remembered, is raised merely as to what is the proper construction, *i. e.*, the meaning and intention of the whole sentence. When, in order to make out the affirmative, cases were put of the words being “for years,” or “for life,” or “in fee,” I could hardly suppose that the distinction between each of them and the words in question could have escaped notice. These are all unequivocal in themselves, and in-

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the eldest son of *Catherine Watson*, was, at the death as well of *Frances Ann Langham* in 1828, as of *Phillis Langham* in 1830, heir of the grandfather, by *Mary*, his second wife; and if he took the reversion in fee, subject to the prior estates, all of which expired in 1849, then the Respondents are right in their contention.

The object of the bill filed by Mr. *Wright* was to obtain a declaration of his right according to the construction for which he contended, with an account of the rents received since his title accrued, and for a partition against the persons entitled to the other portions of the property. Answers having been put in, the cause was duly brought to a hearing, and Vice-Chancellor *Kindersley*, in an elaborate judgment, made a decree in favour of the Plaintiff, giving him an account of the rents, not from the death of *Atherton Watson*, in 1851, but from the filing of his bill in 1852. Against that decree the Respondents appealed, and the appeal was heard early in this session, with the assistance of the learned judges. Owing to their absence on the circuit, their opinions were not given till after *Easter* term. All the learned Judges who heard the case, except Mr. Justice *Willes*, are of opinion that the *Vice-Chancellor* took a correct view of the law on this case. And, concurring with them as I do, I have no hesitation in moving your Lordships to affirm the decree below.

I cannot distinguish this case, in principle, from *Mandeville's* case (*f*). That case is thus stated by Lord *Coke*: "*John de Mandeville*, by his wife, *Roberge*, had issue, *Robert* and *Maude*; *Michael de Morville* gave certain lands to *Roberge*, and to the heirs of *John Mandeville*, her late husband, on her body begotten, and it was adjudged that *Roberge* had an estate, but for life, and the fee tail vested

(*f*) Co. Lit. 26 b.

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Mr. *Butler*, in his note to *Fearne* (g), says, it is an “anomalous case;” but he adds, that “the law is settled, but the principles on which it is settled are not easily discoverable.” And this is precisely the sort of case in which the importance of adhering to what has been decided is far greater than that of having a rule abstractedly the best or most consonant with other principles. It is impossible to say how often, in advising on titles, conveyancers may have acted on the authority of this ancient case, stated, without doubt, as good law by Lord *Coke*, commented on by Mr. *Fearne*, apparently with approbation, and never, so far as I know, seriously questioned. The rule, moreover, which it enunciates, is one certainly very convenient, even if, on strict legal reasoning, it may be to some extent anomalous.

The main stress of the argument, however, did not rest on the notion that *Mandeville*’s case was to be questioned, but on there being grounds for distinguishing the present case from it, and that mainly on the authority of *Roe* d. *Nightingale* v. *Quartley* (h). In that case there was a devise “to *Hester Read*, daughter of *Walter Read*, and to the heirs of her body for ever; and for default of such issue, then to such child or children, as the wife of *Walter Read* is now *enceinte* with, and to the heirs of the body or bodies of such child or children; and for default of such issue, to the right heir of *Walter Read* and *Mary*, his wife, for ever.” *Hester Read* entered on the death of the testator. *Mary Read* was not *enceinte*, and died (without ever having any other child) before *Walter*, her husband. Then *Walter Read*, her husband, married a second wife, and afterwards died, leaving issue the Defendant, *Constantia*

(g) P. 83 n.

(h) 1 T. R. 630.

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“for ever” occurring, and those words being sufficient to show, that the previous words ought to be read as a mere *designatio personæ*. This was the view of the case taken by Mr. Justice *Willes*, and is, therefore, entitled to great attention. But I am unable to concur in it. The words “for ever” would, no doubt, be sufficient, if the context required it, to create an estate in fee; but, considering how very commonly those words are used in connexion with an estate of inheritance, whether in tail or in fee, being, in fact, merely tautologous, I cannot think that they make any real difference. It is not unworthy of remark, that in the very case on which we are commenting, of *Roe v. Quartley*, the words “for ever” are used in connexion with an estate tail, the first gift being “to *Hester Read* and the heirs of her body for ever.” Mr. Justice *Willes* says, that if we construe the devise according to the rule in *Mandeville’s* case, there is an intestacy as to the ultimate fee. No doubt that is so, and that affords an argument in favour of the construction which he adopts, but it is not, in my opinion, sufficient to outweigh those which press in an opposite direction. All the learned Judges having concurred in this opinion, with the exception of Mr. Justice *Willes*, I shall move, as I have already stated, that the decree of the Court below be affirmed.

Before I quit the subject, I ought to mention, that in the course of the argument it was suggested, on the part of the Respondent, that there was a portion of this judgment which ought to be varied. The *Vice-Chancellor*, in giving judgment, directed an account of the rents only from the time when the bill was filed, and not from the preceding year, in which *Atherton Watson*, the preceding tenant in tail, had died. His Honour did not do that *per incuriam*. He considered the case very fully, and thought that, inasmuch as during that year the rents had been received by a

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But on referring to that case, it will be seen that what Lord *Coke* said was merely as an advocate and not as a judge, for he was *Attorney-General* at that time. And in all the treatises upon the subject since, *Mandeville's* case has been deemed good law.

Then the only question is, whether the present case can be distinguished from *Mandeville's* case. I confess that, during the course of this inquiry, I have felt that if this had been a discussion of this question for the first time, and I had been called upon first to decide on the meaning of this clause in the will, I should have entertained some doubt whether it was not to be distinguished from *Mandeville's* case, by two circumstances; the one, that it is a bequest "for ever," which imports in fee; and secondly, that if you construe this to be an estate tail, there will be an intestacy as to the remainders over, which is a circumstance that you ought to avoid in construing wills. My noble and learned friend has mentioned that Mr. Justice *Willes*, in the opinion which he gave, pointed out that circumstance; but I think he is mistaken there; for I do not think that any one of the Judges who have given opinions upon this case, has pointed out that to construe this to be an estate tail, would create an intestacy. But the creating an intestacy is only an argument against that construction, nothing more. However, I cannot say that my notions on that subject have amounted to much more than a doubt in the course of this inquiry, and I hold that you ought not to reverse a careful and elaborate decision of the Court below, unless you are satisfied that it is wrong. A mere doubt in your own mind as to the propriety of the construction, ought not to entitle you to reverse the judgment. And when I consider that that judgment has been recognised as being perfectly sound, by four Judges out of the five who have given their opinion, I certainly cannot

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Lord *Wensteydale*: If we could properly make an order for the costs to come out of the estate, I should wish to do so, but we cannot.

Decree and order affirmed.

[Lords Journals, July 20, 1858.]

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 July 9, 12,
 15.

Will.
Supplying
Words.
"But."
"Dying"
"without
Issue."
Practice.
Two Appeals.
Costs.

WILLIAM ABBOTT and others	-	-	<i>Appellants.</i>
ELIZA MIDDLETON and others	-	-	<i>Respondents.</i>
GEORGE H. M. RICKETTS	-	-	<i>Appellant.</i>
G. W. W. CARPENTER	-	-	<i>Respondent.</i>

A testator gave an annuity of 2,000*l.* to his widow, and set apart, out of his personal property, a sum sufficient to provide for its payment. He then directed that, on the death of his widow, the sum so set apart should "become the property of my son *George*, so far as he shall receive the interest during his life, and on his death the principal sum to become the property of any children he may leave, in such sums as he shall direct, but in the event of my son dying before his mother, then the principal sum to be divided among the children of my daughters, the deceased *Jane R.* and *Mary P.*, and of my now surviving daughter, *Elizabeth M.* (should she leave any issue) in equal portions." *George* married after the date of the will, had one son, and died before the testator:

Held, affirming the decree of the *Master of the Rolls*, that on the death of the testator's widow, the son of *George* became entitled to the fund which had been set apart to provide the annuity, for that the property in it vested in the children of *George*, independently of their father, who merely took a life interest in it.

Two appeals in the same interest and raising the same point were presented. One set of Appellants claimed to be entitled to one-third, the other to two-thirds of the property in dispute. Though the ambiguity was declared to have arisen from the act of the testator in framing the will, yet as there had been two separate appeals when one would have been sufficient, the House refused to make any order as to costs.

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document;" and named his wife, *Hester*, and his son, *George*, executrix and executor of his will.

At the time this will was made, Captain *George Carpenter* was unmarried, but he married soon afterwards, namely, on the 4th July 1834, and had a son born to him, *George William Wallace Carpenter* (the Appellant), on the 10th May 1835. Captain *George Carpenter* attained the rank of lieutenant-colonel in his regiment, and was killed at the battle of Inkermann 5th November 1854. The testator died on the 16th January 1855; his wife *Hester* died soon afterwards. She had renounced probate; and letters of administration, with the will annexed, were granted to the testator's daughter, Mrs. *Eliza Middleton*. In April 1855, *William Abbott* and *A. F. Paxton*, the trustees under the marriage settlement of one of the testator's granddaughters, filed their bill against *George William Wallace Carpenter*, Mrs. *Eliza Middleton*, and others, praying the execution of General *Carpenter's* will. The cause came on for hearing before the *Master of the Rolls*, who, by a decree of the 16th April 1856, declared that, according to the true construction of the will, in the events that had happened, *G. W. W. Carpenter*, as the only son of the testator's son, *George Carpenter*, took a vested interest at the testator's death in the capital of the fund set apart to answer the annuity to the widow, subject to her life interest therein (a). The appeal was against this decree.

The *Attorney-General* (Sir *F. Kelly*), and Mr. *R. Palmer* (Mr. *Lorence Bird* was with them), for the Appellants (b):

The principle that the words in a will must be read in

(a) 21 Beav. 143.

(b) There were several Appellants in this case represented by different counsel. Mr. *R. Palmer* and Mr. *Lorence Bird*, signed the

their ordinary sense as written, was expressly declared in this House in the recent case of *Grey v. Pearson* (c), and is that on which this case must be decided. Words not used by the testator must not be interpolated in a will in order to give to it a meaning which must be purely conjectural, and to dispose of property upon an event which he had never contemplated. *Brownsword v. Edwards* (d) and *Doe d. Usher v. Jessep* (e) were fully considered in *Grey v. Pearson*, and the principle laid down in the latter was preferred. *Denn d. Radclyffe v. Bagshaw* (f) is a clear authority to the same point. The estate here never vested in *George Carpenter*. In *Hodgson v. Ambrose*, Lord *Mansfield* said (g), "The words 'for want of such issue,' mean the same thing as 'and after such estate tail,' and this is the common case of a remainder after an estate tail, where, if the first estate never takes place, the remainder vests in possession immediately;" and there, the devise having been to *A.* and the heirs of his body, and for want of such issue to *B.*, and *A.* having died in the lifetime of the testator, the estate, though he left a son, was held to go over to *B.* To give this will the construction here contended for by the Respondent, it is necessary to introduce after the word "dying" the words, "without issue," that is to tamper with the will, and to make a new devise for the testator. Nothing but absolute necessity can justify that: *Ker v. Innes* (h). There is no such necessity here. There was such a necessity in *Spalding v. Spalding* (i), which

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papers in *Abbott v. Middleton*, Mr. *Lloyd* and Mr. *Goldsmid* signed those in *Ricketts v. Carpenter*. But as the interests of the Appellants in both cases were the same, the House refused to hear more than two counsel for the appeal.

(c) 6 H. L. Cas. 61.

(d) 2 Ves. Junr. 243, 246.

(e) 12 East, 288.

(f) 6 Term Rep. 512.

(g) Doug. 340.

(h) 5 Paton's Sc. App. 422.
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(i) Cro. Car. 185.

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alone warrants the construction put upon that will, and so it is considered by Mr. Justice *Buller* in *Doe d. Dacre v. Dacre* (*j*). The same answer may be given to *Newburgh v. Newburgh* (*k*).

Mere apparent intention on the part of the testator will not justify the Court in introducing words which he has not used, or in giving them any but their natural and ordinary construction: *Holmes v. Cradock* (*l*), *Parsons v Parsons* (*m*), *Toldervy v. Colt* (*n*), *Gundry v. Pinniger* (*o*). On the face of this will it is plain that the children of *George Carpenter* are to take, through him, which they could not do in the event which has happened, since he himself was never in enjoyment of the property. *Shuldham v. Smith* (*p*) is therefore in point. It is clear from the gift to Mrs. *Middleton*'s children, that when the testator meant dying without leaving issue, he knew perfectly well how to express himself. He has not so expressed himself here, and the intention of adding that qualification cannot be imputed to him.

This is not like the case where an absolute estate of inheritance has been given to the children before the words creating the gift over, as in *Anonymous* (*q*), and *Atkins v. Atkins* (*r*). The children are only to take through their father, and he is only to take on surviving the widow. The House cannot introduce words to change the estate thus given to them. [Lord *Brougham* referred to *Langston v. Langston* (*s*).] There the will would have been insensible had not the House read the clause as if it repeated the previous gift to the eldest son, so that in that case there existed that necessity which does not exist here

(*j*) 1 Bos. & Pul. 250, 260.
 (*k*) Law of Property, 196,
 206, 207.
 (*l*) 3 Ves. 317.
 (*m*) 5 Ves. 578.
 (*n*) 1 Mee. & Wels. 250.

(*o*) 1 De G. M. & Gord. 502.
 (*p*) 6 Dow. 22.
 (*q*) Anders. p. 33; Cas. 84.
 (*r*) Cro. Eliz. 248.
 (*s*) 2 Clark & F. 194.

for introducing new words into the will. The devise, as it stands, is simple and clear, and it might well be that the testator intended to give to the children of his son, or rather not to take away from them, property which their father had once enjoyed, but not to give it to them if he had not enjoyed it. The *Master of the Rolls* looked into extraneous circumstances to assist himself in putting a construction on this will; a course which, it is clear, he was not entitled to adopt.

The word “But,” which introduces the devise over, must be taken as descriptive of a state of things exactly the opposite of what has been previously provided for, and it effectually carries over the gift from the son to the children of the daughters.

The *Solicitor-General* (Sir *H. Cairns*) and Sir *R. Bethell* (Mr. *C. Hall* was with them) for the Respondents:

There is no intention here to suggest a reconsideration of the principle stated in *Grey v. Pearson* (*t*), nor to ask the House to depart from the words of the will, or to introduce new words into it. The will sufficiently expresses the intention of the testator to give to his son and to his son's children a vested interest in the fund which he set apart for the widow's annuity. The words here created an estate tail in the son's children: *Mandeville's case* (*u*). He is to enjoy that fund for life, and it is to go to them “on his demise,” whenever that may occur. This is a clear gift to the children: *Anonymous* (*v*), and cannot be cut down, except by an equally clear and express declaration in a subsequent part of the will: *Edwards v. Edwards* (*w*), *Malcolm v.*

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(*t*) 6 H. L. Cas. 61.

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(*u*) Co. Lit. 26 b.

(*w*) 15 Beav. 357.

(*v*) Anderson's Rep. 33 ;

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Taylor (x). In this case, as in *Kirkpatrick v. Kilpatrick (y)*, there was an absolute vested interest, with payment postponed. The interest thus vested is only to be divested on the death of all the persons on whom it has been conferred.

The words, in case of "my son dying," must be construed to mean dying as before expressed, that is, without issue, or else the plain intention of the testator will be defeated: *Spalding v. Spalding (z)*, and the observations on that case by Lord *Hale*, in *King v. Melling (a)*, and by Sir *J. Strange*, M. R., in *Targus v. Puget (b)*. So to read the will cannot be described as interpolating words, for it is doing no more than reading incomplete expressions according to the plain intention of the testator.

The argument, as to the testator not having used the words "not leaving issue," in the gift over, when speaking of his son's death, though he used them with reference to his daughter, Mrs. *Middleton*, is not applicable; for the son's children had, by previous words, a vested interest in this fund clearly conferred upon them, which was not the case with the daughter's children. If, as Vice-Chancellor *Wood* observed, in the case of *Hillersdon v. Lowe (c)*, the testator had been "content with simply saying, 'failing that gift,' he gave it over to some ulterior object," no possible doubt could have been raised. Does not this will amount to saying that? To answer this question in the affirmative, it is not necessary to look at extraneous circumstances, nor did the *Master of the Rolls* adopt that course. He took the plain intention of the testator from the words of the will, and that intention was to give the son the interest of the fund for life, and the fund itself to

(x) 2 Russ. & Myl. 416.
 (y) 13 Ves. 476.
 (z) Cro. Car. 185.

(a) 1 Vent. 225, 230.
 (b) 2 Ves. 196.
 (c) 2 Hare, 355.

his children after his death. The very fact of restricting the son to the interest of the fund for his life showed a plain intention to preserve the fund itself for the son's children.

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[Lord *Cranworth*: If, upon the death of the son, without issue, in the lifetime of the widow, the fund went over to the daughter, might not the widow be stripped of her annuity?]

She might, and that is one of the inconsistencies that would follow from adopting the construction contended for by the Appellants.

The cases of *Denn v. Bagshaw* (d), *Parsons v. Parsons* (e), and *Shuldham v. Smith* (f), are not in point. In the first, the will contained the express words, "if living at the time of her death," and the son had died before that time; in the second, the events which happened had not been provided for; and in the last, the person claiming did not fulfil the description given in the will. *Doe v. Dacre* (g) is in favour of the Respondents; and in *Doe d. Leach v. Micklem* (h), it was expressly held, that words might be supplied in a will to render a sentence complete and intelligible in aid of the apparent intent to be collected from the whole context. That rule was acted on in *Home v. Pillans* (i), and still more strongly in *Gee v. The Mayor of Manchester* (j).

The word "But" is not necessarily in opposition to what precedes it. It is a conjunction, as well as a preposition. In one case it is derived from *be out*, and is equivalent to *except* or *without*.

(d) 6 T. R. 512.

(e) 5 Ves. 578.

(f) 6 Dow. 22.

(g) 1 Bos. & P. 250.

(h) 6 East, 486.

(i) 2 Myl. & K. 15.

(j) 17 Q. B. Rep. 737.

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[Lord *Brougham* : As in the motto of the *Macphersons*, "Touch not a cat but [without] a glove."]

In the other case, it comes from the Saxon *bottan* or *be-ottan*, and means to superadd, to subjoin; now expressed by beyond this, or moreover. Here its meaning is plainly moreover. This case, however, cannot be made to depend on these niceties of language.

Mr. *Palmer*, in reply :

The word "But" is here disjunctive and adversative.

[Lord *Brougham* : Is it used as in algebra : $A.B. =$ to $C.D.$ but $C.D. =$ to $E.F.$, therefore, &c. Does it not mean moreover ?]

No, for that is equivalent to "subject thereto;" which is a reading that certainly cannot be applied to the present case.

The case was ordered to be argued a second time, by one counsel on a side.

Mr. *Rolt* (Mr. *Goldsmid* was with him) for the Appellants :

The principle of construction is laid down by Lord *St. Leonards* (Lord Chancellor) in *Wilson v. Eden* (*k*) : "That you are never unnecessarily to introduce and interpolate words in a will, nor ever to give a construction to any clause of a will contrary to what the plain words import, without an absolute necessity, by intention declared or evinced in some other part of the will." Applying the rule thus expressed, the decision here cannot be sustained. It is a legal rule of construction, that the Courts will not so deal with the different parts of a will as to make the ultimate correspond with the preceding gifts. If they do

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Ellicombe v. Gompertz (t.), and *Lee v. Busk* (u), all establish that there is not any principle of construction, that where there is a previous gift, and then a gift over, the words of the will are to be strained in order to make the two gifts correspond. The argument, that the testator knew, when he wished, how to use language properly describing a dying without issue is perfectly well warranted in this case, and the terms in which he has expressed himself show that there is no necessity for treating him as *inops consilii*.

Assuming that this is an absolute gift to the children of *George Carpenter* on his death, how does that afford a key to the intention of the testator on the happening of an event of a collateral nature. There is nothing to show his intention except the words he has used, and those words make the gift over to depend on *George* dying before his mother, which event did happen.

The *Solicitor-General* (Sir *H. Cairns* ; Mr. *C. Hall* was with him) for the Respondents :

The argument on the other side resolves itself into this, that a testator has a right to be capricious ; but then the question is, whether he has been so here ? The rational reading of this will is, that a fund is set apart to produce the widow's annuity ; that fund is to become the property of the son, only, however, to enjoy the interest of it, for the principal he has no power to dispose of, except by apportioning the shares among his children. To them, therefore, the fund is really appropriated. A passage has been quoted from the judgment of Lord *St. Leonards* in *Eden v. Wilson* (v) ; there is another passage in the same page, which is particularly applicable here, as this will was made by the testator while he was at the *Cape of Good Hope*

(t) 3 Myl. & Cr. 152.

(v) 4 H. L. Cas. 284.

(u) 2 De G. M. & Gord. 810.

and *inops consilii*, and the two passages must be read together :—" If the most illiterate person makes his own will, though there is not a word of correct grammar in it, yet if you can collect the intention you are bound to give legal effect to it." The testator's intention here can be plainly collected from the whole will. He has not indeed done that which Vice-Chancellor *Wigram* in *Hillersdon v. Lowe* (*w*) described as certain to avoid all difficulties, but he has made his intention clear. It is an established rule that, where there is a gift to a man for life, with remainder to his children or issue who are to take as purchasers, or to him and the heirs of his body where they take by descent, and then there is a reference to the death of that man *simpliciter*, the gift must be construed with reference to the death of the first taker in such a way as will not interfere with the benefit which has been previously given to his issue : *Anonymous* (*x*). It is true that a rule as to estates tail in realty, which that was, cannot be exactly applied to estates tail in personalty ; but the principle at least assists materially in arriving at the proper construction in one, as well as in the other instance. Again, it is a settled rule, that if an interest is vested it cannot be de-vested, except by the clearest expressions. Such expressions do not exist here, and if " But " is read as moreover there is no difficulty in the matter ; it is clear that the testator meant only to give to the daughters what had never been capable of being enjoyed by the son or his children. This is a contingency with a double aspect : *Wallop v. Darby* (*y*). There the testator gave all his lands in *England* to *J.* his son and his heirs, and if he died without heirs, then his lands in *Calver* to *J. B.*, his nephew, in tail ;

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(*w*) 2 Hare, 355.

(*y*) Yelv. 209.

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“*Item*, I give my land in *F.* to *S.*, my nephew, in fee.”
 The devisor died. *S.* died and the son survived, but afterwards died without issue; and the question was between the heir of *J. B.* and the heir of *S.*, and the Court held that *S.* shall be in the same condition as *J. B.*, for the lands to both were taken after the death of the son without issue; the word “*Item*” being dependent on the preceding words. *Roe d. Snape v. Neville* (z) proceeded on the same principle. There the first gift was of part of the freehold to the wife for life, with remainder over; then followed a gift of all real and personal estate, freehold and copyhold, to the wife and her heirs, and the copyhold was charged with the debts; the latter clause was held not to revoke the former, but to be in addition to it, leaving the remainder over untouched. There was here no revocation of the gift to the son and his children, and it was only meant to go over on failure of both.

Mr. *Rolt*, in reply :

The testator did not provide for all events that might happen; as, for instance, if the son had lived, and the grandson had died during his life, the grandson would not have been entitled. The strict words of the will must therefore be taken as the only proof of what the testator intended. This is not a contingency with a double aspect, and *Wallop v. Darby* and *Roe d. Snape v. Nevill* have no bearing on this question. There was nothing contradictory or doubtful in the will in either of these cases.

The *Lord Chancellor* (Lord *Chelmsford*), after stating the facts of the case, said :

The whole question turns upon one clause in the will, or

(z) 11 Q. B. Rep. 466.

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and grandchildren, by distributing his property amongst them, in different proportions, the whole amount having been stated by him in a paper accompanying his will. In this distribution, it was evidently his intention that the son and his children should receive the largest share, as he not only gives them the fund provided for the annuity, but also makes his son his residuary legatee. According, however, to his statement of the amount of his property, the residue would be nearly exhausted by the specific legacies and the annuity fund, so that a very small residue would have been enjoyed by the son, and he would have been in a less favourable position than his sister and his sister's children till the death of his mother. It is stated, that at the time of the testator's death, his property had very largely increased. But, although a will is said to speak from the death of a testator, yet, in construing his intention, you must necessarily refer to the period of making the will. If the Appellants are right in their construction of the will, the son of the testator's son, the principal object of his regard, would derive scarcely any benefit from the dispositions of the will, but would be superseded by all the other members of the family, themselves already the objects of distinct and independent provisions. This appears to me to be utterly inconsistent with the obvious meaning of the testator. The dispositions of his will are perfectly clear down to and inclusive of the bequest to the children of his son. A fund is set apart for the annuity to the widow. The interest of that fund on her decease is to be received by the son during his life, "and on his decease the principal sum to become the property of any child or children he may have born in lawful wedlock, and in such sums as he shall will and direct." The son of the testator, therefore, had a life estate given to him in the fund, with a contingent interest to his children in the principal. But the son

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event, on which the gift over depends, is implicated and involved in the prior limitations; it is not, as in the case supposed, self-interpreting, but itself creates an ambiguity which, without it, would not have existed.

There are few of the cases cited in the argument which are of much assistance in determining the construction which ought to be adopted in this case. All those on which an estate was to commence, or to take effect upon certain specified events, which never occurred, and in which the gift therefore altogether failed, are obviously inapplicable. This is a case in which a gift, either absolute or contingent, is clearly and distinctly made, and the question is whether the words, on which the doubt arises, take it away again, on the happening of an event not consistent with it, but upon which the determination of a prior gift depended.

That appears to me to be a safe and reasonable principle of construction which was stated by Lord *Brougham*, in the case of *Horne v. Pillans* (c), "that where there is a clear gift, it can only be altered and retracted by the most plain, and unambiguous, and unequivocal words, and the Court will, *in dubio*, justly prefer that construction of any subsequent clause which will make it consistent with the intention plainly expressed in the preceding part."

But it was strongly insisted by the Appellants' counsel, that it was impossible for your Lordships to decide in favour of the Respondents in this case without overruling the case of *Holmes v. Cradock* (d), which was alleged to be a case where there was a bequest in derogation of a previous absolute gift, which was allowed to prevail. But *Holmes v. Cradock* was a case which ranges under the head of those to which I have already alluded, where an

(c) 2 Mylne & K. 25

(d) 3 Ves. 317.

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(c) 2 Mylne & K. 25

(d) 3 Ves. 317.

interest was to take effect upon an event which never happened. There the bequest was, "if my son shall die, leaving my wife, without leaving a widow or any child; after his death and my wife's, I give and bequeath to Mr. *Holmes* 500 l." The son survived the wife, and died without leaving a widow or child, and it was held that Mr. *Holmes* was not entitled to the legacy, as all the events had not occurred upon which it was to take effect, one of them being that the son should die leaving the wife. This was not the case, then, of a previous gift taken away by subsequent words, but a gift upon certain conditions, which were not fulfilled.

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Here there is, first, a plain and unequivocal gift, and then there are words immediately following which at once produce an inconsistency, and therefore an ambiguity in the dispositions of the will. By reading the will as if it had said, "But in case of my son dying before his mother without leaving a child," the whole is rendered plain and consistent. Are your Lordships then at liberty to supply these words as the expression of a necessary implication? Various authorities have been cited in favour of such a course; one of the earliest of which was *Spalding v. Spalding* (e). That was a case very similar to the present, because if the clause had been read as it stood in the will, it was expressed in clear and unambiguous words, and reasons might readily have been suggested as in this case, why if *John* died living *Alice*, the estate should go over to *William*, although *John* had left children; but there the very words which are wanting here (or equivalent ones), were supplied, and the clause was read, "If *John* die without issue, leaving *Alice*." I do not think that the application of that case can be weakened by the observation that the

(e) Cro. Car. 185.

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cannot discover the motive influencing the person by whom they are used.

It was argued that the words used must be read as a gift over, subject to the preceding gifts, but to take effect only in the case of the son dying before his mother. On any other hypothesis, it was said the construction will deprive not only the son's children, but also the testator's widow, of the benefit of the fund set apart for her benefit, the language being, that if the son dies in his mother's lifetime, then, and in that case, which (as was argued) must mean at that time, and on that event, the principal sum was to be divided. I do not agree with this argument; "then," as there used, is not an adverb of time, but of relation. The widow was, at all events, to have her annuity for her life, and the fund set apart to secure it must have been meant to endure till the annuity should terminate. There is nothing in the language preventing a construction which secures this object, and indeed the testator expressly provides for the fund going over on her decease, that is, not before her decease.

It is not disputed, that if there had been no settlement directed of the fund, that is, if it had been given absolutely to the son, without more, then the gift over in the events which happened must have taken effect. Now, it has occurred to me, as one mode of looking at this case, to read it as if all the words, "so far as he the said *George Carpenter*, my son, shall receive the interest on such sum during his life; and on his demise, the principal sum to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will, and direct," the words, in short, which direct the settlement, were read as if in a parenthesis, that is, as if the son were restricted to a life estate, with remainder to his children, in something already given to him absolutely, but

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little help in enabling us to say what is the meaning of another.

Many of the cases relied on were cases where a gift over being made in a failure of issue, after a gift to some particular classes of issue, that issue on whose failure the gift over is to take effect, has been considered to be confined to that class only in whose favour the prior gift was made. This was the case of *Malcolm v. Taylor* (*m*), and *Ellicombe v. Gompertz* (*n*); and there are many other similar decisions, the subject being discussed by Sir *James Wigram*, in *Hillersdon v. Lowe* (*o*). Such a construction has been called the referential construction, and cannot, I think, apply to a case like this, where the event on which the gift over is to take effect, is a collateral independent event.

Again, in *Spalding v. Spalding* (*p*), a gift of a real estate to the wife for life, with remainder to the eldest son in tail; but if the eldest son should die, living the wife, then to the second son, was held necessarily to mean, on the whole context of the will, if he should die without issue, living the wife; for on no other construction could all the provisions of the will, in the opinion of the court, take effect. So, in *Holmes v. Pillans* (*q*), where there were legacies to the testator's two nieces, when they should attain 21, but, in the event of either dying, leaving a child, then to that child, the nieces were held to take absolute interests on attaining 21, the *Lord Chancellor* holding, contrary to what had been held by Sir *John Leach*, that the gift over was only intended to provide against the event of the nieces dying during minority. All the cases coming

(*m*) 2 Russ. & Mylne, 421.
 (*n*) 3 Mylne & Cr. 143.
 (*o*) 2 Hare, 355.

(*p*) Cro. Car. 185.
 (*q*) 2 Mylne & K. 15.

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to keep within what I consider to be the strict rules of law applicable to a case of this kind. We all agree about the general rules of law upon this subject. My noble and learned friend on the woolsack has referred to what fell from me in *Eden v. Wilson* (s). I stated very strongly, in that case, the rule ; and I still adhere to it, and I do not mean to run counter to it. You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it, without absolute necessity. You must find an intention upon the face of the will to authorise you to do so. When I say, "upon the face of the will," you are, by settled rules of law, at liberty to place yourself in the same situation in which the testator himself stood. You are entitled to inquire about his family, and the position in which he was placed with regard to his property. I doubt whether we should be justified in looking to the amount of the property, although it is referred to. I disclaim, at present, any intention whatever of referring to the amount of the property which he then possessed. It is personal property. He enumerates his property. He does not profess to dispose of it as constituting all his property. On the contrary, he makes his son residuary legatee. It would be dangerous, therefore, in my apprehension, to found the decision of this case judicially upon the amount of the property.

Now, as I admit that you may, I must look at the intention, that intention is to be gathered, in my apprehension, from the whole of the instrument. It was very elaborately argued, that you can only look to what is called the proximate declaration of intention, that is, dealing with the exact property which is in dispute. Now, no doubt you

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and had left children, and he had a living daughter without children, and he intended to provide for them all, and he did so. To the children of those who were dead he gave at once a large provision, actually to vest in them. And when you are talking of ambiguity, there is ambiguity even there; for he talks of persons that are to survive without telling you whom they are to survive. So that this is not a will without ambiguity elsewhere. For in the gifts with regard to the children and grandchildren, there are ambiguous words that require construction. He provides for the daughter who was unmarried, and for her children, if she should have any, and if she should not, he gives it over.

Then when we come to what was the first and principal object of his bounty, his son, he gives the property in question to his wife for life, then to his son for life, and then to the son's children, I will assume it to be, who should be living at his death. If we stop there, of course there is no question. And we must stop there with this observation, that the property is actually given without any doubt or ambiguity to the son's children, so that if it is to be taken away from the children we must find clear words to effect that object.

Now there is one important observation in this case. There is no contingency expressed or implied upon which the property is given to the children. There is no contingency in the gift itself to the children. There is no exclusion of the children upon the happening of a contingency upon which the property is given over. Now taking it by degrees, let us consider for a moment how it would stand in this case. To the widow of the testator for life, to the son for life, to the son's children, just as he has given it, and after the son's death if it had stopped there, then over. There can hardly be a reasonable doubt, but what the

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the event happened, the gift over does not include every possible case. Therefore the gift to the children is not displaced partially by the gift over. I should therefore have thought on that construction, that it would have admitted of considerable ground for saying, standing there alone, that it is stronger than the other would have been.

Now, what if you try it by transposition or division; suppose it stood thus: to the wife for life, to the son for life, and if the son die without children, living his mother, then to the other grandchildren in substitution. Try that first; then take it, to the wife for life, to the son for life, and then if he die in his mother's lifetime, to the children of his sisters, and, if his mother die in his lifetime, then to his own children. I cannot see how that is consistent with any possible intention of the testator, because he is adding to the large portion of his daughter's children at the expense and destruction of all present provision for the children of his son; indeed, in destruction of all provision for his son's children, because although the son himself takes under the residuary bequest, yet the testator did not intend that the children of his son should be dependent wholly upon their father, but he meant to provide for them an absolute positive fortune, which they should possess independently of the father. The other construction is inconsistent with the whole of the will, and I confess I should have thought it almost an impossible construction.

Then it is said, there is one contingency already existing; namely, that the gift to the children of the son is contingent; that it is to those children only who may be living at the death. Why, therefore, it may be asked, should not another contingency be added? Undoubtedly another contingency has been added. But that cannot alter in any manner the previous disposition itself. It is not a question whether the children of the son are to take when they

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than “*but*,” but I am not inclined to dwell on a word, generally speaking, where an interest is given, as here, to children absolutely. If a testator, in a given event, means to defeat that interest, he introduces it by strong words, such as “provided always,” or “I declare my will and mind to be,” or “I declare my intention to be, that upon such an event happening, then it shall go over.” We must distinguish, therefore, between cases where the previous gift is properly cut down, and cases in which (if this be such a case), there is a short or imperfect statement of the event upon which the testator intended to found the gift over.

If, therefore, I had to come to a conclusion simply, and only upon my view of the case, independently of authorities, I should say at once that this testator intended to cut down the gift to his son’s children only in the event of their failing, and the son pre-deceasing his mother. There is some sense in that. His son has the property. As soon as the property had got into the son’s family, he did not mean that it should go over to the children of the sisters, for whom he had already fully provided. If the son had once enjoyed the fruit, the tree was to remain with him. He would take it under the residuary gift, or it would go to his children. But if he did not live to enjoy it, and left no children, then the testator says, As my wife will be enjoying it during the whole of her life, I may as well give it after her death to those who will be living, and capable of enjoying it. And, in connexion with this, I cannot strike out the residuary clause which operates upon this very property. Remember, I am not going out of the will, or out of my province, when I look at the residuary clause; the residuary clause operates on this very property we are now discussing. And I look at it to ascertain what was the intention of the testator. I can

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hard case, to relax and to disturb settled rules. I shall therefore trouble your Lordships by referring to the cases bearing upon this question, most of which have been cited in the argument (there are one or two more which were not cited) in order to show your Lordships, as I hope I shall be able to do, that the conclusion to which I am advising you to come upon this case is altogether consistent with the clear and settled rules of law.

The first case is that of *Anonymous* (*t*), and though it has been referred to before, it is so pertinent that I must refer your Lordships to it. It is in *Norman French*. "If a man by will devise all his lands to another, and the heirs of his body begotten, and devise afterwards by the same will, that if the devisee die the same lands shall remain to another in fee, the Court held that the devisee should have an estate tail by the first words, and no estate by the latter words." Now, that is exactly this case, in fact. The conclusion is a little difficult to understand, but it clearly meant that the gift should not be cut down. That is precisely this case, except that there is no contingency. But supposing that had been a gift over on the death of the son without any addition, then that case would fit this exactly, for it is a devise to one in tail, and if he dies, to another over, without saying if he dies without issue. The clear construction was, that there was nothing to cut down the previous gift, and therefore the devisee took an estate tail.

At the conclusion of that case there is a reference to a case in *Hilary*, 33 *Elizabeth*. The case intended to be referred to, is, I believe, *Atkins v. Atkins*, which is a very important case on this subject, in *Croke, Elizabeth*, 248. There a man devised his land to *S.* and the heirs of his body, and after his decease to *B.* the eldest son of *S.*, and

(*t*) Andors. Rep. 33.

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Darby (u), referred to, which is also one bearing very much upon this question. In that case of *Wallop v. Darby* "A man devised all his lands to *J.* and his heirs, and if he died without heirs of his body, then his lands in *Culver* to *J. B.* his nephew, in tail; also I give my land in *F.* to *S.*, my nephew, in fee." The question was, whether that was a remainder over, or an original and substantive devise, and the Court of King's Bench decided that *S.* took by way of remainder, after the death of *J.* without issue, for the words "Item, I give, &c." depend on the precedent words, and *S.* shall be in the same condition as *J. B.* the nephew would be, for the estates limited to *J. B.* and *S.* are certainly conjoined to the limitations of the estate of *J.* the son, namely, after his death without issue. Now, that is a very strong authority for showing that the Court will not cut down a previous devise upon an uncertain gift, but that even although it was introduced, "Also, I give," without reference to the previous gift, yet it was held to amount to a mere remainder upon the previous gift.

Then there is the case of *Luxford v. Cheeke* (v), which was not cited in the arguments, and I think that is also an important authority upon this case. "A man devised all to his wife for her life, if she don't marry, but if she do marry, that *Humphrey*" (that is his son) "presently after her decease, enter, have, hold, and enjoy all the land to him and the heirs male of his body, remainder to *Robert* and the heirs male of his body, the remainder to *Anthony* and the heirs male of his body, and so on." The wife did not marry, and the question was, whether the remainder over took effect. "The Court resolved that the land was entailed by this will, for by the whole scope of the will it appears plainly the

(u) Yelv. 209.

(v) 3 Lev. 125.

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sidered as an authority on the mere first words, without looking at what I fully admit we are bound to look at, and which the Court, in deciding that case, did look at; namely, the whole context of the will. In that case a man had three sons, *John*, *Thomas*, and *William*, and he devised the land in question to *John*, his eldest son, and the heirs of his body, after the death of *Alice*, his wife, and if *John* died, living *Alice*, that *William* should be his heir." Now, that is exactly this case. That is a gift to a man and the heirs of his body, and it is just the same as this case, except that this is so far stronger, that there the heirs of the body would take through the father, and here the children of the son take independently of the father. After the remainder to *William*, it proceeds: "Also, he devised other lands to *Thomas* and the heirs male of his body, and if he died without issue, that then *John* should be his heir. And he devised other lands to *William* and the heirs of his body." Then comes this devise: "And if all his sons should die without heirs of their bodies, that then his lands should be to the children of his brother." That event did not happen; *John* survived; *Alice* did not live as it was supposed she would, but died in *William's* lifetime. The Court held, upon the whole context of the will, "that it was to be construed according to the intent of the party, and that the construction shall be, that if *John* die without issue, living *Alice*, that then *William*, his youngest son, should have it; and it shall not be construed (where he limits it first to *John* and the heirs of his body) that by this limitation he intended, if he died, living *Alice*, that *William* should be his heir, *John* having issue, and thereby to disinherit the heirs of *John's* body. And what was his intent appears by the other parts of the will, that the other sons shall have other lands to them and the heirs of their body." "And if they all die without issue, that it shall be to his

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eldest." Now look at that: Lord *Hale* tells you that he could not be thought to prefer the youngest son before the issue of the eldest. I ask, could the testator here be considered to have intended to prefer the children of his daughters, at the expense of the children of his eldest son? That is the reason Lord *Hale* gives for the decision in *Spalding v. Spalding*. I admit that we are not to press it beyond its legal import, still, all subsequent Judges have considered that it proceeded upon the general rule, that if you can get at the intention on the face of the will, you are at liberty to add words in order to carry it out. Now, the intention here is quite as satisfactory to my mind as it was to the Court of King's Bench in *Spalding v. Spalding*, because I cannot look at the whole frame of the will, as was done in that case, without seeing that the testator here never could have intended to sacrifice the positive clear interest that he had given to the children of his son, merely to accumulate and add to the fortunes of the children of his daughters, so that the effect might have been to leave the children of his son absolutely destitute of all fortune, while he would be adding unnecessarily to the fortunes of the children of the daughters.

There are a good many other cases which also bear upon this question. There is the case of *Newburgh v. Newburgh*, which is quoted in the "Treatise of the Law of Property as administered in this House" (*y*) (and I believe nowhere else), which I had the honour of arguing at your Lordships' bar. It is a very important case. I have travelled through that case. I know how difficult and almost impossible it was thought to establish the construction that this House ultimately adopted upon the advice of Lord *Eldon* and Lord *Redesdale*. It was most elaborately

argued and very much considered. The gift there was of estates in the counties of *Sussex* and *Gloucester*. Mr. *Butler*, in settling the draft, unfortunately ran his pen through the word "*Gloucester*," if I recollect rightly. Then the word "counties" was altered, in the copy, into "county," because they saw that there was only one county mentioned. That was a simple mistake; and then the question arose, whether Lady *Newburg*, who was intended to take both estates for life, was not deprived of the *Gloucestershire* estates. That case underwent the most elaborate discussion from court to court. None of the Judges before whom the case came, could bring his mind to suppose that the words could be supplied, and, therefore, the case was argued over and over again before several courts, upon the question, whether you could admit parol evidence to show that this was a mistake, and so to supply the words. It was held that you could not. And at last (although, as stated in this book), the point was very faintly argued at the bar as to the possibility of supplying words, this House, upon the construction afforded by the other clauses in that will, actually decided that you must read the words of the gift as including the estates in the county of *Gloucester*, which were the very words that had been cut out of the will. So that is a very great authority for supplying words in a gift over, when you collect from other parts of the instrument an intention to include the property in question, although, in the very words of the gift, the property is not mentioned. It is an authority bearing very much, not upon the question of supplying the words "without issue," but upon what is substantially the same question, namely, a question arising upon a gift over, with an imperfect description of the subject, with respect to which you have to inquire whether you can give effect to that gift over, not as it is confined in words to the parti-

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cular property, but according to the intention which you collect from the entire instrument, extending the gift to other property.

The case of *Langston v. Langston* (z), which was in this House, also bears, in some measure, upon this case; for there, by a simple accident, there was no doubt about it, the limitation to the first son was omitted, and then there was a limitation to the second son, and so on, and then to the third, fourth, and other sons. It was held, upon the context, that the first son came in under the ultimate limitation. There is no doubt that he was excluded by accident only; by some accident the words had been struck out, and he was not therefore in his proper place. But this House, by construction, held him to come within the provision.

Doe v. Micklem, referred to at the bar, is an important case, I think, upon this question. In *Doe v. Micklem*, the words, "after her death," were supplied, and supplied only by construction. Lord *Ellenborough* (a) says, "The devise is in these words, as to the freehold lands in the parishes of *Bray* and *Clewer*, in the county of *Berks*, called *Holmers*, I hereby give and bequeath the same to my sister *Imber* for her life, or, if she should survive and outlive my wife and sister *Heath*, so that she shall come into possession of the estate at *Upton Gray*, then I give and devise the said estate in *Bray* and *Clewer*, called *Holmers*, to my dear good friend, Mrs. *Mary Martha Lena Imber*." Now, that word, "or," had really there no meaning; but, instead of striking that word out, as being inoperative, and as a word to which they could give no meaning, what did the Judges do? They said, "If, therefore, the words necessary for this purpose" (for the pur-

(z) 2 Clark & F. 194.

(a) 6 East. 493.

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that there was the gift over. But the Court struck out those words, and from the intention collected from other parts of the instrument, made it a simple donation, to take effect after the husband's death.

The case of *Malcolm v. Taylor (d)*, which has been referred to, is a strong case, and a rule is laid down there to which I entirely accede; that it is natural to suppose that gifts over, when they are not expressed so as clearly to defeat a previous gift, are intended to follow that gift in succession. The Court, in that case, acted on that rule; and I am ready to support that as a rule, and to advise your Lordships to act upon it. In applying that rule to this case, remember you start with a clear unambiguous, unconditional, unrestrained gift to the children of the son, and you have to displace that. If I find anything subsequently directly opposed to it, I sacrifice the general intention which I collect with respect to the children of the son, and I agree that the words of the will must operate. But, if I find an imperfect intention expressed in the gift over, I must come to one of two conclusions, either to give effect to an intent to cut down the previous gift over, though that intent is imperfectly expressed, or I must supply words. Remember, there is not here a word saying, if he shall die, living his mother, *though* he shall have children, for whom I have before provided; there is not a word of exclusion. Therefore, I must either give a construction which will cut down the previous gift, or I must supply words. One or other must be done. Nobody can read the words and say, they are to be taken plainly, without consideration and without construction. I must construe them, and construing them as I do, I clearly gather, to my apprehension without the slightest doubt, what was

the intention of the testator, namely, a gift over, if the son died without children, leaving his mother living at his death.

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For these reasons, I consider the construction at which I have arrived in favour of this gift to the children of the son, is clearly warranted by the intention of the testator. I have, as I have already said, carefully guarded myself not to advise your Lordships to give effect to the intention, unless I can do so without disturbing any rules of law, or any authority. I have satisfied myself that I can give this advice to your Lordships without disturbing any rule of law. In advising your Lordships to adopt that construction, I do so, I think, consistently with every rule that has been stated. I break in upon no rule. I disturb no settled axiom of law. I endeavour, and always have endeavoured to keep within those rules; but, while I have endeavoured to keep within those rules, I have also endeavoured, where I could, to make them bend so as properly to meet the justice of the case. I agree therefore with my noble and learned friend, the *Lord Chancellor*, that the decree of the *Master of the Rolls* should be affirmed.

Lord Wensleydale:

The case now before your Lordships is one of many in which the mind is imperceptibly tempted to swerve from the established rules of construction, by the apparent hardship of the case, and the highly probable conjecture that the testator never could have intended that which his words have expressed. Nothing can be more reasonable than to suppose that he meant in this case to provide that his son's children, after their father's death, should take the property bequeathed to their father for life, whether he died in his mother's lifetime, or afterwards. But the rules

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which are to govern the construction of wills, as well as all other written instruments, are now very clearly established, and it is impossible to overrate the importance (notwithstanding all the temptations from supposed hardship or probable intention) of steadily, strictly, and faithfully adhering to those rules, for the sake of the great interests of society in avoiding litigation, and affording the only chance of obtaining as much certainty in the construction of wills as such a subject is capable of. It is better, as Mr. *Fearne* says (p. 173), "that the intentions of 20 testators every week should fail of effect than that the rules should be departed from, upon which the security of titles and the general enjoyment of property so essentially depend."

The question in expounding a will, as Sir *James Wigram* most correctly states in his excellent work on the application of parol evidence to the construction of wills (page 7, 2d Ed.) "is not what the testator meant, but what is the meaning of his words." The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing, and that writing only is to be considered. It is now, I believe, universally admitted, that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended or abridged, so as to

avoid those consequences, but no farther. This rule in substance is laid down by Mr. Justice *Burton* in the case so frequently quoted of *Warburton v. Loveland* (e). It had previously been described as "a rule of common sense as strong as can be," by Lord *Ellenborough* in the case of *Doe v. Jessep* (f). It is stated as "a cardinal rule," from which, if we depart, we launch into a sea of difficulties not easy to fathom, by my noble and learned friend when chancellor, *Gundry v. Pinniger* (g); and as the "golden rule," when applied to Acts of Parliament by Chief Justice *Jervis* in *Mattison v. Hart* (h), and by the late Mr. Justice *Maule* as "the most general of rules, a general rule of great utility," *Gether v. Cupper* (i). Many other authorities might be cited, but there is no doubt of the excellence and generality of the rule.

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Quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument; whether this modification of the rule is stated to be, that words may be supplied, where so warranted; or, as the *Solicitor-General* said on his first argument, that words are never supplied, but that the instrument may be read as if the words were supplied, is matter of no consequence whatever. The meaning is precisely the same, but the latter mode of stating the proposition is skilful, and has a tendency to obtain a more ready acquiescence in the introduction of other words.

Now, in honestly and fairly applying the above-men-

(e) 1 Hudson & Brookes' Reports. 648.

(f) 12 East, 293.

(g) 1 De G. M. & Gord. 502.

(h) 14 Com. B. 385.

(i) 24 Law Jour. C. P. 71.

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tioned rule of construction, I cannot, I own, though for a short time influenced by the able and ingenious mode in which it was put on the part of the Respondent, see any difficulty in construing the words of this will. What the testator has written is perfectly clear from beginning to end. He has as distinctly stated as words can distinctly state anything, that the capital provided for payment of the annuity is to go to the children of his daughters if his son dies in his mother's lifetime. There is in this provision no inconsistency or repugnance to any other part of the will, reading the words in their ordinary and grammatical sense. The fund set apart for the payment of the annuity to the widow is, on her decease, to become the property of the son, *George Carpenter*, during his life, and on his demise to become the property of the child or children he may have born in lawful wedlock; but in case of this son dying before his mother, then and in that case the principal sum is to be divided between the daughters of the testator's deceased children, *Mrs. Ricketts* and *Mrs. Parton*, and his surviving daughter, *Mrs. Middleton*.

There is no inconsistency or repugnance, as the *Master of the Rolls* seems to have thought, in the defeating a prior limitation upon a particular contingency; it is a most common circumstance, and in no way repugnant or inconsistent, or many wills might now be set aside.

The word "but," as philologists very properly state, has two meanings. The subject is discussed in *Mr. Horne Tooke's Diversions of Purley*. But whether the word means in this case "but" synonymous with "in addition," "to boot," as if the testator had said "moreover;" or "but," in the sense of "without this" or "except;" as if in this case he had said "except," the meaning of the supplied words is precisely the same. They clearly indicate the meaning of the writer, that if the son should die in his mother's lifetime,

the fund is to go over to the daughter's children, and not to the son's children. This meaning is too clear to admit of the slightest doubt.

We may conjecture that the testator meant to have written the additional words "without issue," and omitted them by mistake. But that is a mere conjecture, and we have no right to give effect to that conjecture. It is clear that the testator has not so written; and all we can do is to explain what is written. We must construe the will as we find it; and it is no objection to giving the words effect that we may think the condition whimsical; if the words are distinct, however whimsical, we must then allow them to stand.

However, it is very easy to imagine reasons which the testator might have had; the estate might have been limited *aliunde* to his son's children, if he died in his mother's life, or he might have thought that, if his son died in his mother's lifetime, with children, she would have meant to provide for them out of her income or other property. Probably these reasons were not well founded, but it is most likely that proof would have been offered of them, whether strictly admissible or not. But I think that such conjectures, whether well or ill-founded, can make no difference.

It was very properly argued by Mr. *Palmer*, that if the condition of defeasance had been that if the son should embrace the Roman Catholic faith, no one could have questioned the provision, for the testator may have reasonably supposed that his children might have been brought up in the same faith, and so give over the property in that event to his daughter's children. Supposing it had been simply "if he should go to *Rome*," should we refuse to let the condition have effect, or would you allow your decision to be influenced by the probability that if he went

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to *Rome* he would have become captivated with the splendour of that creed, and become a convert, and so pronounce that the provision was valid because there was some plausible reason for it. Suppose the testator had made the gift contingent upon his son not going to *Florence*, or to a place short of *Rome*, or upon his not going abroad at all, would you say that there was sufficient colour of reason of a similar kind, but refuse to give effect to it whenever you could see no shadow of reason of any kind?

The truth is, all these speculations are vain and idle. If the words are clear and intelligible, as these undoubtedly are, there is no legal ground whatever to deprive them of effect unless you can clearly make out an inconsistency with the context, and a declared intention in it so plain, as to enable you to add words to reconcile them; but you certainly cannot find any context here which will have that effect. The *Master of the Rolls* thinks he can see a repugnance between the gift to the children, and the condition to take it away, and therefore introduces the words "without issue"; but I see no such inconsistency, for the reasons above given.

The *Solicitor-General* in his very skilful argument in the first hearing, does not state any other inconsistency, or venture to suggest that an introduction of these words can be made, but he suggests that the same effect can be produced by a less violent alteration, by reading the will as if it had contained after the word "but," "subject thereto," or "subject to the bequest of the capital to the son's children," in case of my son dying before his mother, then to the daughter's children. But really this is to introduce words which are not in the will, without any sufficient reason, only the alteration really made in the sense is no quite so startling at first sight as that made by the *Master of the Rolls*; but still, it is to introduce most materia

words, and there is no legal warrant, according to the established rule, to introduce any such words.

It was suggested by my noble and learned friend opposite that some alteration was necessary in this condition, for if the son died in his mother's lifetime, the mother would be deprived of her annuity. If it were so, it would do the Respondents no good in this case, and it would equally follow, if the condition were altered as suggested by the *Solicitor-General*. But it is clear that upon looking carefully at the will, the income of the wife is not affected by the death of her son in her lifetime, with or without issue; the provision is, "then and in that case, the capital is to be divided between the daughter's children." The word "then" has more meanings than one. It may mean "at that time," or "in that case," or, "in consequence;" those being three of the meanings attributed to it in *Johnson's Dictionary*. Any one of these meanings may be given to it in its ordinary acceptation, and we may construe it as synonymous with "in that case," or "in consequence of that," instead of requiring the capital to be divided at that time, which would deprive the wife of her life estate. That ought not to be defeated, unless the words clearly require it. In my mode of construing the words "then and in that case," there is surplusage. If "then" is read as meaning "at that time," the words "in that case" have the same meaning. If "then" is read as meaning in "that event," the words "at that time" have the same meaning. But no objection arises from the use of superfluous expressions.

A great many cases were cited at the bar, as they always are, when the question is on the construction of wills. Generally speaking, these citations are of little use. We are no doubt bound by decided cases, but when the decision is not upon some rule or principle of law, but upon

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the meaning of words in instruments, which differ so much from each other by the context, and the peculiar circumstances of each case, it seldom happens that the words of one instrument are a safe guide in the construction of another ; besides, as the established rule of construction which ought to be carefully applied in all cases, is often though unintentionally, under the influences which I have referred to, lost sight of ; in such cases they are no authority at all. It would not be an useful occupation of time to inquire whether in all the cited cases, and they are many, the rules of construction, though now professed to be disregarded, have always been faithfully and steadily followed.

The case of *Spalding v. Spalding* (j) which the *Master of the Rolls* has quoted, but not placed reliance upon, is one in which the context fairly justifies the introduction of words, but it is admitted by his Honour, that the context there is stronger than in this case, and I think that though properly decided it is no authority to justify his decree. In truth there is no context here warranting any alteration at all. The words of bequest to the children of the daughters are most clear and unequivocal, and though I cannot help suspecting a mistake, yet to introduce words to deprive them of the property would be, not to expound but to make a will for the testator. My advice, therefore, to your Lordships would be, to reverse the decree of the *Master of the Rolls*. If that should not be the result, I can only say that I am glad, because I believe that it was a mistake on the part of the testator.

The *Attorney-General* suggested that as the case was one in which the whole question had arisen from what could not now be doubted to be at least ambiguity and difficulty arising upon the face of the will itself, which was

(j) Cro. Car. 185.

the act of the testator, it was not unreasonable that the costs should be paid out of the residue.

The *Solicitor-General* objected to this suggestion, on the ground that two appeals had been presented by parties in precisely the same interest, and raising the same question, which had had the effect of very greatly increasing the expense.

Lord *St. Leonards*: As the doubt has arisen upon the testator's will, his estate ought to pay for it; therefore, it would be perfectly right that the costs of one set of Appellants should come out of the estate. But there ought not to be more than the costs of one set of Appellants.

The *Attorney-General*: I appear for Appellants, who are entitled to two-thirds of the whole interest.

Lord *St. Leonards*: These Appellants should have gone together. Let the two sets of Appellants have one set of costs as one Appellant. How was it that the parties in the same interest did not join together.

Mr. *Goldsmid*: My Lords, the way in which the presentation of the two appeals arose was this. The persons entitled to the smaller interest, that is, one-third only of the fund in dispute, according to our construction of the will, were the Plaintiffs in the Court below. Then the parties entitled to two-thirds of the interest naturally did not like to confide their interest solely to the persons entitled to one-third only, and they therefore presented an appeal.

Lord *St. Leonards*: They ought to have joined, and not have come here with two appeals to try one point.

Mr. *Goldsmid*: Each party had the right to present an appeal.

Lord *St. Leonards*: I think certainly there has been an improper proceeding as regards the two appeals, and,

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therefore, the better way will be that there should be no costs.

Mr. *Bird*: Will your Lordships permit me to say one word. I am with Mr. *Palmer* for one set of Appellants. The circumstances are these: One petition was presented by the children of *Mary Paxton*. Before presenting that petition, after it was prepared, we invited the other Appellants to join us in the petition. In point of fact, the draft petition was prepared upon the assumption that they would join us as co-petitioners. That, however, was declined; then our petition was presented, and afterwards a second petition was presented for those Appellants whom my learned friend, Mr. *Goldsmid*, represents.

Mr. *Goldsmid*: No, the other appeal came on first.

The *Attorney-General*: I hope your Lordships will not think it unreasonable to give the costs out of the residue, looking at what was ordered in an analogous case in the Privy Council (*Dyce Sombre's case*)(*k*). In that case there were two parties, but only one party in substance. The point was the same with respect to both, and a general order was made, that the costs were to be paid out of the estate, but it was to be the costs of one party only. It would otherwise be very hard upon those for whom I appear, who are interested to the extent of two-thirds of the whole of the property, and who are not themselves to blame for anything that has been done. If this is a case in which costs ought to be paid out of the estate, they should have, at least, their proportion of the costs.

Lord *Wensleydale*: One set of costs to be paid, and equally divided between the two sets of Appellants.

Lord *Cranworth*: The Respondents ought to be indem-

(*k*) 10 Moore P. C. Cas. 232.

nified as to one appeal. Would it not be the best way to cut the knot, and say, that there shall be no costs; because, if, in one appeal, one set of costs is to be received and divided between the two classes of Respondents, and, on the other hand, the costs of the other appeal are to be paid to the Appellants, it will come to the same thing.

Lord *Wensleydale*: But the second Appellant is the person who ought to bear the burden of that.

Lord *St. Leonards*: We cannot enter into their respective merits. I think the better way will be to say that there shall be no costs; it is hardly possible to do justice otherwise.

The *Attorney-General*: Our appeal was first. I do not desire to ask anything, but what is in conformity with what I understood fell from your Lordships with regard to the Appellant's costs, that he would be entitled to his costs out of the residue.

Lord *St. Leonards*: Your appeal was against the intention of the testator, and after the decision in favour of that intention.

Lord *Wensleydale*: Certainly the Appeal was brought upon very fair grounds. The arguments which have been now used in support of the decree are not those which were used in support of it when it was made.

The *Attorney-General*: If one set of costs should be given, of course the Respondents will take their costs out of the estate.

Lord *St. Leonards*: No costs are given.

Lord *Wensleydale*: I should rather have thought that it would be right to give one set of costs, to be divided between the two parties.

Sir *Richard Bethell*: If your Lordships give one set of costs to the Appellants, you must dismiss the second Appeal with costs.

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The *Lord Chancellor* (after consultation with the other Lords): It is the opinion of their Lordships that there should be no costs.

Decree affirmed without costs.

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 13, 16.

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New South
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WALTER G. WHICKER - - - *Appellant.*
 JOSEPH HUME and others - - - *Respondents.*

A WILL must be executed according to the law of the country where the testator was domiciled at the time of his death.

The grant of probate not appealed against, conclusively established that it was so executed.

A. was born in *Scotland*: when a young man he went to the *East Indies*, where he remained above 20 years in the Company's service: he then returned to *Scotland* and lived in *Edinburgh*, where he put his name on the books of the municipality, married, took a house, entered into business as a partner in a banking-house, and became a member of various societies there established. At the end of a few years he left *Edinburgh* in anger, the banking business had come to an end, and he took off his name from the books of the municipality and of the various societies, and declared his intention never to return to "*Auld Reekie*": he lived in *London*, first in lodgings, and then in houses hired for different periods, lectured on Oriental literature, and endeavoured thereby to increase the sale of some books which he had written on the *Hindustance* language. At the end of some years he went to *Paris* to avoid some annoyances in *London*, but never made any such declarations with respect to *London* that he had made with respect to *Edinburgh*, and he left his works in *London*, and likewise some ornamental furniture which he desired a friend to keep for him till his "return." He died in *Paris*, having just before made a will in the *English* form:

Held, that he had lost his *Scotch*, and obtained an *English* domicile.

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months afterwards. Claiming to be connected with the noble Scotch family of *Borthwick*, he obtained a licence under the sign manual to use the name of *Borthwick*, in addition to his own, and procured a grant of arms from the Heralds' College, in which he was described as "*John Borthwick Gilchrist, of Camberwell, in the county of Surrey, Doctor of Laws, late Professor of the Hindostanee language in the College of Fort William, at Calcutta.*" In the latter end of 1806 he went to *Edinburgh*, enrolled his name on the books of the municipality, and entered into business as a banker, with *James Inglis*, for 14 years, to commence from 1 *January* 1807, with a proviso, that either party might dissolve the partnership at the end of the seventh year. In 1808 he married a *Scotch* lady, and had a residence in *Nicholson-square*, and became a member of several societies established in *Edinburgh*. In 1815 the banking partnership, which was not successful, was dissolved, as from the 30th *June* of that year. In *June* 1817, on account of some real or supposed affront, he quitted *Edinburgh* and came to *London*. In 1818 he again obtained from the *East India* Company the appointment of professor and lecturer in Hindostanee. These labours in teaching Oriental languages had for their chief object to sell his books on that subject, which had always remained in *London*. This continued till the 20th *June* 1825, during the course of which time he wrote letters declaring his intention never to see "*Auld Reekie* again," and, speaking on occasion of a particular matter which had occurred in *Edinburgh*, he described it as "a blow which dissolution cannot efface from a conscious retrospective mind, wherever it may wing its flight, and one that impels me to disown and deny my country as a tyrannical stepmother, to whom, since my return after a long absence, I owe nought save the deepest disgust." He sold his house at *Edinburgh*, and most of his furniture; but brought the rest to *London*; he likewise removed his

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determinable on six months' notice given before the expiration of the three or the six years. The lease also contained the following proviso, not to assign "in whole or in part without the consent, in writing, of the lessor. Only in the case of unforeseen events which shall force the lessee to quit *Paris*, or in another case also unforeseen, the interests of his family, the house may be let conjointly by the lessor and the lessee, the latter remaining responsible for the rent; or even the present lease may be cancelled at the end of six months' notice after one year of holding; and provided that the hiring shall only cease in the month of *January*." In 1840, being in *London*, he instructed his solicitor to prepare a will for him, which was accordingly done in the common form, and sent to *Paris*, but before its arrival there, Mr. *Lawson*, an *English* solicitor, practising at *Paris*, had prepared another. On the arrival of the *English* will, a codicil was added by Mr. *Lawson*, and the will and codicil were both executed on the 8th *December* 1840. The description of the testator inserted in the will was, "*J. B. Gilchrist*, of the city of *Edinburgh*, but now residing at 10, *Rue Mategnon*, in the city of *Paris*." At the time of making his will, he was possessed of the following property:—A freehold estate at *Sydney*, *New South Wales*; a freehold flat, or floor, in *Hunter-street*, *Edinburgh*; 100 shares in the Commercial Bank of *Scotland*, valued at 17,450*l.*; and 2,000*l.* capital stock of the Bank of *England*; household furniture in *Paris*; and 5,842 copies of his Oriental works, and some ornamental furniture, which were in *London*, the last having been expressly left with friends to keep till his "return" to *London*.

The will gave to his wife his household goods, furniture and plate, linen, glass, china, carriage, horses, jewels, trinkets, wines, &c., and money in his house for her abso-

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thereby, but that all the real estate, after satisfying lawful charges thereon, belonged to the heir-at-law; that the trusts thereof were inoperative and void; that the residuary estate was undisposed of, and that, subject to the debts of the testator, the same by the law of the testator's domicile belonged to his next of kin (exclusive of the widow's interest) and he prayed for a declaration accordingly, and for an account.

In *November* 1842, the executors filed their bill, praying that it might be declared that the will was well proved, and that the trusts thereof ought to be carried into effect.

By an order of the Court made in both causes, in *January* 1843, it was referred to *Master Richards* to inquire where the testator was domiciled at the time of his death, and who were his heir-at-law and next of kin. In *December* 1844, the *Master* reported, that the Appellant was his heir-at-law, and that certain other persons were his next of kin; and in *November* 1849 he made a farther report, by which he found that the testator was domiciled in *London*.

The Appellant excepted to this report, insisting that it ought to have been found, that the domicile was either *Scotch* or *French*. The exceptions were overruled by Lord *Langdale* (*January* 1851)(a). The cause was heard before Sir *John Romilly*, who (*April* 30, 1851) declared the will to contain a good charitable bequest, and decreed accordingly (b). The case was taken on appeal before the Lords Justices, and the decree of the *Master of the Rolls* affirmed (c). The present appeal was then brought against both these decrees.

(a) 13 Beav. 366.

(b) 14 Beav. 509.

(c) 1 De G. Macn. & Gord. 506.

Mr. *Rolt* and Mr. *Greene* (Mr. *Morris* and Mr. *Springall Thompson* were with them) for the Appellant;

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There is not in this case, as in *Forbes v. Forbes* (d), any difficulty upon the question of domicile arising from two residences having been occupied at the same time by the testator. Here his domicile was *French* by virtue of residence at the time of his death, or it was *Scotch* as his domicile of origin. The Appellant contends that it was *Scotch*. That domicile of origin was not changed *facto et animo*, both of which must be conjoined to produce such a result: *Dalhousie v. M'Douall* (e), *Munro v. Munro* (f); and a man cannot be said to have lost one domicile till he has adopted another, *Somerville v. Somerville* (g). This is the result of the cases collected on this subject in "*Phillimore on Domicile*" (h).

[Lord *Wensleydale*: Is it open to you to argue the question of domicile in this case after the grant of probate?]

It is. The first order made in this case by the *Master of the Rolls* was a direction for an inquiry what was the domicile of the testator at the time of his death. That order was never appealed against, but the inquiry was entered upon and a report made, and the confirmation of that report, on the *Master's* finding, is the first subject of this appeal.

[Lord *Wensleydale*: But is not the grant of probate conclusive *in rem* upon the question of domicile?]

It is not. The grant of probate is conclusive as to nothing except that a particular person is entitled to bear the

(d) 1 Kaye, 341.

(e) 7 Clark & Fin. 817.

(f) Id. 842.

(g) 5 Ves. 750.

(h) P. 100, *et seq.*

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character of executor, *Thornton v. Curling* (i), where Lord Eldon considered himself at liberty to examine into the question of the domicile. There may be a power created, giving A. authority to make a will. A. executes some paper; the Ecclesiastical Court admits that paper to probate; so far it appears to be a will; but a court of construction may afterwards say, that there has not been a due execution of the power, and that the paper is not, in law, a will at all. Again: a married woman may make a will, and the person named as executor may obtain probate in the Ecclesiastical Court, but in the Court of Chancery, a court of construction, it may be shown that the will is the will of a married woman who had no special power reserved to her to make it, and then the executor, who has obtained the probate and the property in virtue of that probate, will hold it as a trustee for the person lawfully entitled. The decision of the Court of Probate and that of a court of construction may be the same, but they may also be opposed to each other. The former is not binding on the latter.

[Lord Wensleydale: Do you find any authority for that except the dicta of Lord Eldon in *Thornton v. Curling*? Can you question the validity of this instrument anywhere except in the Ecclesiastical Court? The question of domicile was open to you there. Probate would not have been granted, unless the will was in the form required by the law of the domicile: *Stanley v. Beirnes* (j).]

That was a case which arose where there were two residences and it was doubtful which was the testator's domicile, and where he had executed a will and codicils both in the *Portuguese* and the *English* forms.

[The Lord Chancellor: The case of *Bremer v. Free*—

(i) 8 Sim. 310.

(j) 3 Hag. Ecc. Rep. 373.

man (k) decided that the maxim, *Mobilia sequuntur personam*, is part of the *jus gentium*, and, therefore, that the post mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death; and, consequently, if the law of the country allowed the deceased to make a will, that will must be made as that law required.]

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But there is no legal title conferred by such a document which can prevail everywhere and for all purposes. Here the executors had to go to *Scotland* to get a confirmation of their title with respect to the property there. The Ecclesiastical Court may decide who is entitled to administer the estate, but other courts will have to decide in what way the property is to be dealt with. Where a probate is granted by one court, as on a single domicile, the grant cannot conclude all other courts for all purposes whatever.

[Lord *Wensleydale*: For any other purpose with respect to a claim under the will.]

Then, as to the construction of the will; first, the will and codicil, supposing them to be unimpeachable in all other respects, did not have the effect of passing the freehold lands. By the will the testator directed his lands to be sold, and the produce to be invested and disposed of as he should direct by his codicil. Now, the codicil contains no words which affect freehold lands, the testator speaks only of the "trust monies, stocks, funds, and securities bequeathed" by his will; he never mentions lands. Yet he well knew the meaning of the words he employed, for, in his will, when speaking of his lands and his personal property, he uses the words properly applicable to these two things, and says, "devise and bequeath."

(*k*) 10 Moo. P. C. C. 306.

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He has himself, therefore, made a marked distinction between these two sorts of property, and the Court cannot by mere implication attribute to him an intention which the words he has used negative. The lands, therefore, have not been disposed of, *Roe v. Walker*, where this point was, in fact, thus decided, though, from the erroneous omission of the word "not" from the marginal note it appears to be decided the other way (*l*).

[Lord *Wensleydale*: The trustees are to sell the land and invest the produce for the purposes of the trust; and then the codicil directs that they shall dispose of the "trust monies, stocks, funds, and securities."]

The land at *New South Wales* cannot pass by this will. Assuming that the land is disposed of by the words used in the will and codicil, then the devise as to the land there is void, for it is a devise of land to charity, and is void under the Mortmain Act: (*m*). It is a settled principle of colonial law, that in a country peopled from *England*, the law of *England* is in force there: *Blackstone* (*n*). It will be said that the Mortmain Act is not in force in *New South Wales*, first, as a matter of fact, because it has not been adopted by the local legislature there, as stated in an affidavit of Mr. *Robert Lowe*, formerly a barrister, practising in the colony; and next, as a matter of law, because it is not applicable to the condition of things in the colony; and the case of the *Attorney-General v. Stewart* (*o*) decided by Sir *W. Grant*, will be relied on to show that, under such circumstances, a statutory law of *England* does not apply to a colony. It is desired to bring the authority of that case under the review of this House. In that case

(*l*) 3 Bos. & Pul. 375. The mistake exists in the 8vo. Ed. 1826, but not in the folio Ed. 1804.

(*m*) 9 Geo. 2, c. 36.

(*n*) 1 Bl. Com. 107. See this subject considered, *Clark's Summary of Colonial Law*, p. 7, & seq. and 53, 54.

(*o*) 2 Mer. 143.

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Englishmen; and in all such colonies the *English* laws are immediately in force.

[The *Lord Chancellor*: *Grenada* was formerly a *French* island, but after its conquest the *English* laws were introduced there.]

The will is void for uncertainty. The Crown has nothing to do with the matter, for here is a distinct trust, to be carried into effect by known trustees. Where there are conjunctive words, denoting several matters which may or may not be properly described as trusts, the words must be disjoined, in order to test what would be the power of the trustees in execution of the supposed trust. If that is done here, there will not be found any trust that the law can recognise as of a charitable nature. The funds are placed in the absolute discretion of the executors, to be employed "for the benefit, advancement, and propagation of education and learning in every part of the world as far as circumstances will permit." This cannot be called a gift in charity. In *Williams v. Kershaw* (q) the words were, "for such benevolent, charitable, and religious purposes" as the trustees should think fit. The *Master of the Rolls* thought he could not construe all these terms conjointly, and so held the residue to be undisposed of. So in *Ellis v. Selby* (r), the words "to and for such charitable or other purposes," were held to create a trust, but a trust of so indefinite a nature that it could not be carried into effect. Here the words are: "Education and learning." Though the former may be within the statute of *Elizabeth* (s), the latter is not, for it may apply to rewards to be given to the successful exhibitors of matured science, which certainly were not within the intention of that statute.

(q) 5 Clark & F. 111 n.
 (r) 1 Myl. & Cr. 286.

(s) 43 Eliz. c. 4.

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But the law would not give any such effect to the words. If there is one purpose in the bequest which the law does not treat as charitable, the whole bequest fails.

Mr. *R. Palmer* (Mr. *Anderson* and Mr. *Bagshawe* were with him) for the Respondents:

The decision of the Ecclesiastical Court is conclusive as to the question of domicile. That Court could not have proceeded without reference to the domicile, in declaring that the will was to be admitted to proof, and that question of domicile was distinctly raised, for it was alleged that the testator was domiciled in *England*, and that the will was to be determined by *English* law. The Appellant therefore cannot deny that the validity of the will itself was a question depending in the Ecclesiastical Court. If so, the decision of that Court is conclusive in the present appeal. *Thornton v. Curling* (z) is not an authority the other way, for, on reference to the report of that case when it was in the Ecclesiastical Court (a), it appears that Sir *J. Nicholl* treated the question of domicile as irrelevant

words of his will was in some measure indicated by the following paper found after his decease:—

“It having been for a long time my intention, after discharging the various claims as specified in my aforesaid will, and such farther annuities, grants, or bequests, as I, by this amendment, or codicil, thereto, give to the several persons named therein, to devote the remainder of my fortune for the encouragement of moral education, on the most benevolent principle, connected, nevertheless, with my system of a universal language, as set forth by me in a work (¹), the greatest part of which is already in print, as remainder of the whole residue of my property, after discharging the several claims as enumerated in my said will, and this my amendment, or codicil thereto, may be applied to the purposes aforesaid. (Signed) *J. B. Gilchrist*.”

(¹) “The Tuitionary Pioneer.”

(z) 8 Sim. 310.

(a) *Curling v. Thornton*, 2 Ad-dams, 6.

with reference to the factum of the will, as he thought Colonel *Thornton* incapable of creating a *French* domicile, or as having had an *English* domicile, at the time of making the will, being then in *London*, and he threw on the Court of Chancery the necessity to examine into and to decide the question of domicile. But that mode of treating the question was completely overthrown by the decision in *Stanley v. Bernes* (b).

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As to the fact—the testator here acquired an *Indian* domicile; then re-acquired his *Scotch* domicile of origin; then lost it, and acquired an *English* domicile, and never acquired any other.

[The *Lord Chancellor*: Their Lordships are of opinion that the *Scotch* domicile is entirely out of the question. The contest is between an *English* and a *French* domicile.] The *French* domicile was a mere afterthought, and the opinion of their Lordships, in effect, puts an end to the question. For here there was no evidence of that acting *animo et facto*, by which alone a domicile can be acquired. The case of *De Bonneval v. De Bonneval* (c), shows that though length of time is an ingredient in domicile, it is of little value if not united to intention, and is nothing if contradicted by intention.

The *Lord Chancellor* intimated that their Lordships were of opinion that the learned counsel need not trouble himself upon this point, nor as to the applicability of the Mortmain Act to *New South Wales*.

The property here is validly given for a charitable purpose. The “benefit of learning” must mean the advancement of learning. Now a devise for the maintenance of a school is good. A gift for the advancement of “education and of learning” cannot be bad; for they are, if

(b) 3 Hag. Ecc. Rep. 373.

(c) 1 Curteis, 856.

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not actually synonymous, at least not opposed to each other.

The cases cited on the other side do not affect the present. In *Morice v. The Bishop of Durham* (*d*), it was determined that benevolence did not necessarily, and liberality did not at all, signify charity. That cannot apply to education and learning. So in *Vezy v. Jamson* (*e*), the bequest was to charitable or public purposes, or to such private persons as the executors might think fit; which left it entirely doubtful whether anything charitable was intended. So in *Nash v. Morley* (*f*), where the devise was for the benefit of "poor pious persons, male or female, old or infirm, as the executors see fit, not omitting large and sick families of good character," and the doubt was, whether the word "poor" ran through the whole sentence, the devise was held good. In *Ommanney v. Bulcher* (*g*), the devise of the residue was held void because it was "to be given in private charity," which was held to be an object too indefinite to give the Crown jurisdiction, or to enable the Court to execute the trust; and in *Kendall v. Granger* (*h*), where the words were "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," Lord *Langdale* held the gift void, for the words "general utility" would comprehend many things that were not at all in the nature of charity. But such cases as these do not touch the present, where the gift is for the propagation of education, a purpose that the Legislature has recognised as legal.

It may be doubted whether *Browne v. Yeall* (*i*) would receive the same decision if now, for the first time, pre-

(*d*) 9 Ves. 399 ; 10 Ves. 522.

(*e*) 1 Si. & St. 69.

(*f*) 5 Beav. 177.

(*g*) Turn. & Russ. 260.

(*h*) 5 Beav. 300.

(*i*) 7 Ves. 50 n ; 9 Ves. 406 ;
 10 Ves. 27.

sented to the Court, as indeed Lord *Eldon* more than once intimated. These and many other cases were collected in that very useful work, *Shelford* on Mortmain (*j*). In *Townsend v. Carus* (*k*), the trust was for such purposes having regard to the glory of God in the spiritual welfare of his creatures, as the trustees, should, in their discretion, think fit; the gift was held to be good for religious purposes, but was restrained to them. In *Powerscourt v. Powerscourt* (*l*), the trust was to lay out “2,000*l.* per annum till my son comes of age, in the service of my Lord and Master, and, I trust, Redeemer;” and it was held good as a charitable devise, because, as Lord *Manners* said, it could not be distinguished from a bequest to pious uses, which was good. *Nightingale v. Goulburn* (*m*) following *Moggridge v. Thackwell* (*n*), shows that it is no criterion of a charitable bequest that it is not capable of being administered by the Court of Chancery, for that that must be the case with every charitable gift which was to be administered under the sign manual. There the bequest was of residue to “the *Queen’s* Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of my beloved country, *Great Britain*,” and it was held to be good. So in *Loscombe v. Winttingham* (*o*) a gift to the society for the increase and encouragement of good servants, was held valid. And in *The President of the United States v. Drummond* (*p*), a gift of residue to found at *Washington*, under the name of the *Smithsonian* Institution, an establishment ‘or the increase and diffusion of knowledge among men, was sustained,

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(*j*) p. 68, *et seq.*

(*k*) 3 Hare, 257.

(*l*) 1 Moll. 616.

(*m*) 5 Hare, 484; 2 Phill.
594.

(*n*) 7 Ves. 36.

(*o*) 13 Beav. 87. See the note
to this case, p. 89.

(*p*) At the *Rolls*, 12 May
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on the ground that knowledge must mean sound and useful knowledge, and anything for the benefit, advancement and propagation of that, was for the advantage of mankind.

Extent of purpose in the bequest, and largeness of discretion vested in the trustees, do not constitute an objection, of which the strongest possible instance is furnished by *Horde v. Lord Suffolk* (q), where the gift was of 180 l., to be paid annually to a lady for her life, to be by her distributed, in her discretion, to private individuals or public institutions, without limitation or control; and after her death, to be paid to another person, and the survivor, &c., and “to be given away in charity in the same manner as the rest of the money as I have directed my executors, &c.” This was held a good charitable gift, and being left to the absolute discretion of the legatees, rendered a scheme unnecessary. The general result of the cases is that where the bequest clearly points to what the law considers to be a charity, effect is to be given to it. That is so here.

The *Solicitor-General* (Sir *H. Cairns*), with whom was Mr. *Wilkins*, was heard in support of the validity of the will.

Mr. *Rolt* replied.—The very large and indefinite words of this will would be satisfied by the trustees founding scholarships in *Turkey* and *Persia*, for the acquirement there of the languages of those countries, which certainly could not be called a charitable purpose in an *English* will. The bequest in *Nightingale v. Goulburn* was good, because it was for *English* purposes only.

(q) 2 Myl. & K. 59.

The Lord Chancellor (Lord *Chelmsford*) after stating the terms of the will and codicil, said :

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Upon the argument at the Bar three main questions were raised : first, upon the domicile of the testator ; Secondly, whether the Statute of Mortmain, 9 *Geo.* 2, c. 36, applied to a devise of lands, situated in *New South Wales*, and rendered the devise for charitable uses void ; and, thirdly, whether the trust upon which the residue was given, constituted a valid charitable bequest. Upon the point of domicile, an objection was made on the part of the Respondents, that it was not competent to the Appellant to enter into that question, inasmuch as it was concluded by the probate of the will which had been granted by the Prerogative Court. And it is necessary, therefore, very shortly to consider what is the effect of a grant of probate upon a question of this kind.

Now, there is no doubt that it is the province and the duty of the Ecclesiastical Court to ascertain what was the domicile of the party whose will is offered for probate, in order to ascertain whether that is a valid will, the testator having complied with all the requisites of the law of the country in which he was domiciled. But if probate is granted of a will, then that conclusively establishes in all courts that the will was executed according to the law of the country where the testator was domiciled. Supposing the fact to be, that the testator was domiciled in a foreign country, and the will was not executed according to the law of that country, still, if it had been admitted to probate by the proper Ecclesiastical Court here, no other Court could go back upon the factum and raise any question with respect to the validity of the will.

That seems to be exemplified and established by the case of *Douglas v. Cooper* (r). There a married woman, under

(r) 3 Mylne & K. 378.

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the power of appointment in a marriage settlement, which was to be exercised by a will, to be executed with certain formalities, made an instrument, which was admitted to probate by the Ecclesiastical Court, and the *Master of the Rolls* held that he was concluded by the judgment of the Ecclesiastical Court granting probate, from considering the question, whether it was a will; namely, whether it was such an instrument as was required by the power, and that the office and duty of the Court were confined to the consideration of the question, whether that instrument was executed with the formalities which were required by the powers.

Therefore, I apprehend, that this will having been admitted to probate, it must be taken to be a valid will wherever it shall turn out that the testator was residing at the time of his death, but that the place of domicile is still open for consideration, and also the validity of the bequest contained in the will, and the effect of it according to the law of the domicile of the testator. The question, therefore, being open for consideration as to where the testator was domiciled at the time of his death, it will be necessary to enter shortly into the consideration of the evidence upon that subject, upon which I apprehend that your Lordships will feel no very great difficulty.

The testator was a native of *Scotland*, born there in the year 1759. In the year 1782, being then of the age of 23, he went to *India*, and shortly afterwards entered into the service of the *East India* Company as a medical officer. He continued in the service of the *East India* Company in *India* till the year 1804, and by his services with the *East India* Company, he acquired what has been called in several cases an *Anglo-Indian* domicile. He returned to his native country in the year 1804, married there in 1808, and shortly after his return he retired from the service of

the *East India* Company upon a pension which he enjoyed down to the time of his death, which was in the month of *January* 1841.

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There is no doubt that his domicile of origin, revived by his return to, and residence in, his native country. But it is unnecessary to pursue the circumstances of that residence, because your Lordships have already intimated a very strong opinion that in the year 1817, and in subsequent years the circumstances showed that he had relinquished that domicile of origin, and that the real contest was between two alleged subsequently acquired domiciles. In the year 1817, as I have already stated, he quitted *Scotland*, never permanently to return, and established himself in *London*. He was a person well skilled in Oriental languages and literature; he was the author of several Oriental works, and, at the time he came to *London*, he had a large stock of those works on hand at his booksellers. And it was alleged that the reason of his coming to *London* was to promote the sale of those works. He seemed to have considered that the best mode of advancing his object was to give public lectures on Oriental literature; and about the year 1821 he obtained employment from the Directors of the *East India* Company, as professor of the *Hindostanee* language, for three years, which was renewed at the expiration of that time for a farther term of three years, and, afterwards, for one year, which brings us down to the year 1828. At the expiration of his employment under the *East India* Company, he lectured gratuitously, as it is said, for the purpose of facilitating the same object which he had in view, and which brought him to *London*.

Upon his first arrival in *London* with his wife, he went into furnished lodgings, and continued to reside with his wife in furnished lodgings down to the year 1822. He then took a furnished house in *Clarges-street* at a rent of

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house rent for them during the time. And in the year 1840, nine of those packages were removed to *Tilbury's*, I think, in *High-street, Marylebone*, where they remained till after the death of the testator, when, a year or two afterwards, they were removed by the widow, and warehouse rent paid for them.

Now, the circumstance of his leaving this property in *England* appears to me very strongly to indicate an intention to return to this country when circumstances rendered it desirable for him to do so. He was very far advanced in life at that time, and he died at the age of 82, and if he had intended to make *France* his permanent residence, he would of course have removed all his property, and would never have been at the expense of having to pay warehouse rent for it. And there is one circumstance upon this subject which appears to me to be almost conclusive with respect to the fact of his domicile, in the evidence of Mr. *Allen*, the bookseller, in which he says, "that on the occasion of the testator's going abroad in or about the year 1839, he deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence, and until his return to *London*, and that the same remained in my possession at the time of the decease of the said testator." Therefore, I think it is quite clear that there is no evidence whatever of an intention to abandon the domicile which he had clearly acquired in *England*.

Then, was there any intention to reside permanently in *France*, so as to acquire a domicile there? Now, I leave out of consideration the expressions which may be scattered here and there through letters which are to be found in the voluminous correspondence printed in the Appendix, because I believe your Lordships will find expressions with respect to each country of an intention to reside perma-

nently there. I think it is rather more important to consider what is the actual evidence upon this subject, upon which it appears to me to be extremely difficult for the Appellant now to contend that the domicile was *French*. For what was the course which he took ? When the case was before the *Master of the Rolls*, the Appellant does not appear at that time to have ever dreamt of the testator having acquired a *French* domicile, for the whole of the evidence, from the beginning to the end, is presented for the purpose of establishing that his heart clung to *Scotland*, that he had no other views in life but returning there, and dying at home at last.

Now, my Lords, I intimated my opinion, or rather, threw out a suggestion in the course of the argument, that the evidence which was given by the Appellant in this respect completely destroyed any evidence in favour of *French* domicile ; that every expression, every indication of a wish and intention to return to *Scotland*, and end his days there, loosened the idea of his intention to acquire a *French* domicile. And if your Lordships look through the whole of the evidence upon this subject, I think it will be found, that with the exception of some of the casual expressions, which I have adverted to in the letters, the only evidence which can be rested upon for proof that he then intended to acquire a *French* domicile, is the arrangement for taking the apartments in *Paris*, for three, six, or nine years, upon which, at all events, he hung with sufficient looseness to enable him to detach himself from them at a very short notice after the first year of occupation.

What, then, is the result ? The domicile of origin was abandoned, and a new domicile was acquired by his residence in *England* ; that new domicile was never relinquished, no fresh domicile was obtained in *France* ; consequently, the *English* domicile remained undisturbed, and

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that was the domicile of the testator at the time of his death.

That brings me to the second question, which is, as to the effect of the Statute of Mortmain upon a devise of lands in *New South Wales*. In the course of the argument, your Lordships intimated a strong opinion that the Mortmain Act did not apply to the colonies, at all events not to the colony of *New South Wales*. It will, therefore, be necessary for me to address your Lordships only very shortly upon that subject. I consider that this question is almost determined by the opinion of the *Master of the Rolls*, Sir *William Grant*, in the case of the *Attorney-General v. Stewart (t)*, because, although a distinction was sought to be established between that case and the present by reason of the island of *Granada*, which was the colony in that case, being a conquered country, and this being a settled colony, yet I apprehend it will be found, that unless the Act of 9 *Geo.* 4, c. 83, applies to this particular case, the principle involved in the decision of Sir *William Grant* would be completely conclusive on the present question. It is true that the inhabitants of a conquered country have those laws only which are established by the Sovereign of the conquering country, and that the colonists of a planted colony, as it is said, carry with them such laws of the mother country as are adapted to their new situation. But the opinion of Sir *William Grant* related generally, I think, to the Statute of Mortmain, as applicable to all colonies, for he says, "Whether the Statute of Mortmain be in force in the island of *Granada* will, as it seems to me, depend on this consideration, whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to

any country in which it is by the rules of *English* law that property is governed. I conceive that the object of the Statute of Mortmain was wholly political; that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate as between ancestor and heir the power of devising, or to prescribe as between grantor and grantee the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged."

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Now, I think, upon general principles, if the question were without reference to any act of the Legislature, whether the Mortmain Act was applicable to the situation of *New South Wales*, I should most decidedly, without any hesitation, come to the conclusion that it was not; and therefore, I think it would be necessary for the Appellants to show that under some Act of Parliament that particular law was transplanted to the colony, and was ingrafted upon the law and institutions there. Now, the Act which they apply to this case appears to me to have been entirely misunderstood. I do not think that the 24th section of the 9 *Geo.* 4, c. 83, applies to this particular case of a law of policy being applicable to the colony.

What is the Act of 9 *Geo.* 4? It is an Act "To make farther provision for the administration of justice," and for that purpose a Court is established. The greater part of the Act consists of regulations and rules for the government of that Court, and then the 24th section provides, "That all laws and statutes in force within the realm of *England* at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent, or Order in Council, which may be issued in pursuance hereof,) shall be applied in the administration of justice in

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the Courts of *New South Wales* and *Van Diemen's Land* respectively, so far as the same can be applied within the said colonies;" and then it provides for ordinances being made in doubtful cases, to say whether the law shall extend to the colony or not: "Provided always, that in the mean time, and before any such ordinances shall be actually made, it shall be the duty of the said Supreme Courts, as often as any such doubts shall arise, upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively."

Now it would be a most extraordinary thing that this provision should apply to those general laws to which the argument of the Appellant seeks to apply it, and that the colonists of *New South Wales* should not at all know under what law they were living, until they had brought an action, and until in the course of that action they had ascertained by the determination of the Judges, that the particular law about which they were ignorant, was really applicable to the colony. I consider that there is a limitation with regard to the particular laws, which are referred to by this Act of Parliament; and that it applies to laws for the administration of justice in the Courts of *New South Wales*, that if any question arises as to the laws which are applicable to the modes of proceeding in the Courts there, the Judges are to decide upon that question, incidentally arising in the course of the trial of any information or action brought before them, whether the law is or is not applicable to the colony.

Then that being so, it being necessary for the Appellant to show that there is some Act of Parliament which applies the Mortmain Act to the colony of *New South Wales*, and this Act being referred to as the only authority upon the subject, I apprehend that it really has no application to

this case ; that it has been misunderstood, and that neither by common law nor by Act of Parliament, is the Mortmain Act applicable to a devise of lands in *New South Wales*.

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My Lords, the only remaining question that arises upon the words of the bequest in the codicil is, as to whether this is a good charitable bequest of the testator, by which these stocks, funds, and securities, are given to trustees “upon trust to apply and appropriate the same in such manner as the said trustees or trustee shall, in their absolute and uncontrolled discretion, think proper and expedient, for the benefit, advancement, and propagation of education and learning in every part of the world.” And it appeared to be conceded in the course of the argument, that if the bequest had stopped short at the word “education,” the gift would have been good. But it is said that the word “learning” is a word of very extensive signification, and that you may benefit learning in various ways, which would not be charitable. And in the course of the argument, an illustration was borrowed from the argument of counsel before the *Master of the Rolls* in this case (u). It was suggested in the course of the argument there, that if you could suppose any one instance in which learning might be benefited by applying the funds in a way that would not come within the description of a charitable object, that would make the bequest invalid and void. Now it appeared to me, when that argument was put forward, that that was rather begging the question ; because it was first of all putting a construction, and a very extensive construction, upon the word “learning,” which possibly it may be found not necessarily to bear ; and it was only by putting that wide construction upon it, that you could suppose

(u) 14 Beavan, 509.

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that there were purposes to which the fund might be applied, which would not come within the description of a charitable object. The word "learning" is a word which is susceptible of various meanings. It is rather extraordinary that in Archbishop *Whateley's* work upon logic, it is placed among the equivocal words, that is words which have two significations. He says, "'learning' signifies either the act of acquiring knowledge, or the knowledge itself. *Exempli gratiâ*, he neglects his learning; *Johnson* was a man of learning." Now the question is, in what sense did the testator use this expression? I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select that meaning of the word which will carry out the intention and objects of the testator; and I think that your Lordships are not without aid in giving the particular limited interpretation (if I may use the expression), to the word "learning" which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word "learning" the word "education," I think that from the society itself in which you find the word, your Lordships may gather the meaning which it is necessary to put upon it, and that he means the word "learning" in the sense of imparting knowledge by instruction or teaching. Well, if this construction be correct, then I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word "education," although not precisely synonymous with it, and it is admitted in the argument that if the word "education" had stood alone, the bequest would have been valid.

But then it is said, that the bequest is of such an extensive nature, that it is impossible that it can be carried into effect; that it extends over the whole habitable world.

But, I apprehend, my Lords, that there is no difficulty whatever with regard to the extensive character of this gift, because of the trust, for the subject upon which the discretion of the trustees is to be exercised is specific and limited. It is for "education" and for "learning" in the sense of teaching and instruction. And, in that sense, it appears to me, that the case which was cited by the Respondents, and which is printed in the Respondent's case of the *President of the United States of America v. Drummond* (v), may be applicable, where Lord *Langdale* decided, that a gift to the *United States of America*, to found, at *Washington*, under the name of the "*Smithsonian Institution*, an establishment for the increase of knowledge among men," was a valid charity. There the area was as spacious and extensive as in the present case. The particular mode in which the object of the testator was to be carried out was described, namely, by founding an institution for the increase of knowledge among men. Here it is to instruct, to teach, and to educate throughout the world. Then the mere circumstance of this spacious area being open to the discretion of the trustees, would not prevent the gift from being available as a good charitable bequest, the discretion being sufficiently pointed and specific to make it definite and certain.

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Under these circumstances, my Lords, without going into the different authorities that have been cited, because I do not think it is at all necessary, it appears to me, that giving that interpretation to the word "learning," which, I think, we are entitled to give to it, and to which its association with the word "education," seems to me necessarily to point, this, according to all the authorities, is a valid charitable bequest. And, therefore, upon the whole

(v) At the *Rolls*, 12 May 1838.

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of the case, I submit to your Lordships that the decrees of the Court below ought to be affirmed, and affirmed with costs.

Lord *Cranworth*:

My Lords, my noble and learned friend has gone through this case so very fully, that it seems to me I shall be best discharging my duty by adding very little to what he has already said. I will, therefore, only allude very briefly to all the different points.

The first question made is one that was extremely important, namely, the point, whether probate was or was not conclusive evidence of the domicile. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else. That may be illustrated in this way. Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would then arise the question, how is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for, by the law of that country, the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of 10,000 *l.*, it would be the duty of the Court that had to construe the will to say

5,000 *l.* only can go according to the direction in the will, the other 5,000 *l.* must go in some other channel. Therefore, I think it is clear, that that proposition is one that cannot be maintained. In truth, however, in the present case, in my opinion, it is utterly unimportant with reference to the result, because, from the first moment when I understood this case, and saw my way into the very great mass of letters and papers and evidence in it, I could not entertain a moment's doubt that there is nothing here to lead to the notion of anything but an English domicile.

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I will not go into the circumstances prior to 1817, and only very few of them afterwards; but in 1817, I think the evidence is conclusive, that this gentleman quitted *Scotland*, intending to quit it for ever. I do not mean that he did not contemplate at some time or other going back again to visit *Scotland*, but that he never meant to be otherwise than a non-*Scotchman*, an *Englishman*, in truth, because he came and settled himself in *London*. It is said that he was only in lodgings. That is not true; for five or six of the last years he was in *England*, he was in a house in *Clarges-street*, first in one, and then in another. I am not prepared to say that it would make any difference if he had been in lodgings only, or, to use a common expression, only lying at single anchor, so that he could easily go away. That may be a circumstance making it less probable that he meant to establish a residence in that place. It is, however, only a circumstance. Why, how many people are there who have lived all their lives in Chambers, in Inns of Court. Nobody can doubt that they are domiciled there, although that may not be the sort of place in which persons marrying or settling are in the habit of being found. This gentleman, however, in 1817, came to *London*; he was here for four or five years,

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at different lodgings, in *Arlington-street*, and afterwards in two successive houses in *Clarges-street*, all this time prosecuting his avocations in life, endeavouring to make the knowledge which he had acquired, and the works which he had printed, available for profit, and endeavouring to get an increase of income by pensions from the *East India Company*; in short, conducting himself to all intents and purposes as being at home. After that, undoubtedly, he passed a considerable portion of the remaining years of his life abroad. I think he first went abroad for a short time, and then returned again, and was in *London* up to 1833. And he then endeavoured, as my noble and learned friend has pointed out, to establish a newspaper in *London*, another indication of this being his place of residence. That did not answer, and from that year, 1833 or 1834, he was principally in *Paris*, where he died in *January*, 1841; principally in *Paris*, but continually coming to *London*. And I think the circumstance which has been pointed out by my noble and learned friend proves to demonstration that he never abandoned the intention of coming back to this country. He was a person above 80 years of age, and when one sees a man of that age providing for what shall come after a lease of three or six years, one cannot help feeling that the great probability is that he would be in his grave before that time has expired. But that was not this gentleman's view of the case, because he left his library here in the custody of his solicitor, Mr. *Braikenridge*, to be taken care of till he returned; and in the most marked manner, in the year 1839, Mr. *Allen*, the bookseller, says, "He deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence, and until his return to *London*." How can you doubt that he looked to *London* as the place to which, as it were, he belonged?

That being so, I might leave that part of the case; but I think it is not inexpedient on questions of this sort to say, that I think that all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. You may much more easily suppose, that a person having originally been living in *Scotland*, a *Scotchman*, means permanently to quit it and come to *England*, or *vice versâ*, than that he is quitting the *United Kingdom*, in order to make his permanent home, where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict between the duties that you owe to one country, and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling, and the various inducements for pleasure, for curiosity, or for economy, so frequently lead persons to make temporary residences out of their native country. It appears to me, therefore, preposterous to suppose that this gentleman did not look to return to this country.

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Upon the subject of the domicile, my noble and learned friend has alluded to one definition which he said came from the Digest. It is also to be found in the Codes (w) and was a principle of *Roman* law. There have been many others, but I never saw any of them that appeared to me to assist us at all in arriving at a conclusion. In fact, none of them is, properly speaking, a definition. They are all illustrations in which those who have made them have sought to rival one another

(w) Bk. 10, tit. 39, s. 7.

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by endeavouring, as far as they can, by some epigrammatic neatness or elegance of expression to gloss over the fact that, after all they are endeavouring to explain something *clarum per obscurum*. By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it. I think the best I have ever heard is one which describes the home as the place (I believe there is one definition in which the "*lares*" are alluded to), the place "*unde non sit discessurus si nihil avocet; unde cum profectus est, preregrinari videtur.*" I think that is the best illustration, and I use that word rather than *definition* to describe what I mean. It is perfectly clear that, in this case, it was competent to those who questioned the will, to go into this matter, and to ask where he was domiciled, with a view to see how the property was to be distributed. But having done so, they have failed to show that he was domiciled anywhere else than in this country, where, therefore, the property would have to be administered.

Then comes the other question, that of the Mortmain Act, which is new to me, because there was no appeal upon that subject when I had the honour of being one of the Lords Justices (x). The other two points were before us, and therefore are not new to me; although I did not express my opinion at length upon that occasion, because I entirely concurred with my learned colleague in the view he took of the case. And nothing that has happened in this argument has at all tended to shake me in the opinion that the conclusion at which we arrived is a perfectly correct one.

With regard to the question of the application of the

(x) 1 De G. Macn. & Gord. 506.

statute of *Geor. 2* to the colonies, I think the decision of Sir *William Grant* upon that subject is perfectly conclusive. Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies. But there, again, like the definition of domicile, we are always driven to explain by something that itself wants explanation just as much as the subject we are endeavouring to explain. The Act says, "All the laws adapted to the situation of the colony." Who is to decide whether they are adapted or not? That is a very difficult question. But with regard to this Statute of Mortmain, ordinarily so called, I cannot have the least doubt that that cannot be regarded as applicable to the colonies. One thing that the Act requires is, that the deed is to be enrolled in Chancery within six months. When that statute was passed, I believe people would have thought it very chimerical to imagine that they could get from the antipodes to this country, and back again to the antipodes in six months. It might possibly have been done, but it would have been thought a remarkably good voyage; and to suppose that an Act of Parliament is to be held to be in force which requires something so difficult to be performed, as applied to those distant colonies, seems to me very chimerical. But, besides that, there is the exception in favour of the Universities and the Colleges of *Eton* and *Winchester*. It is absurd to suppose that any enactment of this sort could be meant to apply to those distant possessions of the Crown. And more particularly there is no evidence whatever that the evil which that statute was meant to remedy, namely, the increase of the disherison of heirs, by giving property to charitable uses, was at all an evil which was felt or likely to be felt in the colonies. I think it therefore quite clear that that statute does not apply to *New South Wales*.

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Then, with regard to the charitable gift for education

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and learning, it is said that "benefit of learning" would not be charity; but what is the meaning of "education" and "learning?" If I remember rightly, Lord Justice *Knight Bruce* said, I think it means just the same as if he had said, "education in learning." It was objected, you cannot say that, because that would alter the words. Now, you are not to alter the words of a will if by doing so you give a different meaning to it. But where you have expressions so very vague as these used, "for the benefit, advancement, and propagation of education and learning," you must see what the words mean, looking at them in their context, and there I think, *noscitur a sociis*, learning there is the correlative of teaching; it is the being taught. It is for the benefit of educating and teaching only, that, instead of "teaching," the correlative verb is used, namely, the being taught. The meaning is exactly the same. My noble and learned friend has pointed out that "learning" is a word of very equivocal meaning. You talk of having had a "learned education." Strictly, that is nonsense; still less is there any sense in talking about "the learned languages." What is the meaning of that? It means the languages that are learned by people of high education. But, coupling the word "learning" with "education" here, it is evidence that it means education, and education for the benefit of those who are to be taught; and I think that, impliedly, it means this, that they are to be taught that which commonly passes in the world under the name of learning; that is, they are not to be taught how to tame horses, or (I was going to say) how to guide ships, but perhaps that is something which might be taught. But it is for education, as connected with learning, that this charity was meant to be established.

Well, then it is objected that it is extended all over the world. I can only say that I think that was a silly pro-

vision ; but I cannot say that it creates a fatal objection to the validity of the will, because the testator has said not that it shall be applied all over the world, that would be absurd ; but that it shall be for the benefit of mankind in general, in every part of the world, as far as circumstances will permit. In settling the scheme for this charity, it will be the duty of the Court to see that the trustees make it as extensive as the nature of the income will permit. Therefore, in conclusion, I cannot have any doubt whatever that it is a perfectly valid charity.

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Lord Wensleydale :

My Lords, in this case I agree entirely with my noble and learned friends who have preceded me, and I really wish to offer very little in addition to what they have said. The main and principal question in this case is one of fact, and it has been very properly determined by the *Master of the Rolls* upon the facts in evidence, that the deceased at the time of his death was domiciled in *England*. It is perfectly clear that he had lost his *Scotch* domicile and acquired an *English* one ; and therefore the only remaining question was, whether, after having acquired an *English* domicile, he lost it by acquiring a *French* domicile. It is perfectly clear to me, that it is as distinctly proved as it can be, that when the testator began to reside at *Paris*, in the year 1837, he did so without the intention of making that city his permanent place of residence. The very terms in which he took the lease for three, six, or nine years, with the option of quitting at any time upon giving six months' notice, or of quitting it before, the apartments being let jointly by the lessee or lessor, shows that he had at that time no intention of fixing his permanent residence there. And there is other evidence, concluding with that of Mr. *Lawson*, who made his will, showing distinctly that he never went

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to *France* with the intention of permanently residing there.

I think it is quite unnecessary to enter into the question of domicile, though I do not quite agree in the difficulty presented by my noble and learned friend who last spoke as to the definition of "domicile." There are several definitions of domicile, which appear to me pretty nearly to approach correctness. One very good definition is this: Habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter his intention; I also take the definition from the *Code*, which is epigrammatically stated, and which I think will be found perfectly correct, that domicile is "*in eo loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit; unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur, quod si rediit, peregrinari jam destitit.*" I think that definition, if examined in all its parts, will be found to be tolerably correct, and that, if well applied in this case, it will lead to a proper conclusion as to where the testator's domicile was at the time of his death. I perfectly agree with my noble and learned friend that in these times of visiting abroad, transferring oneself even for years abroad, you must look very narrowly into the nature of the residence abroad before you deprive an Englishman living abroad of his *English* domicile. In this case, I apprehend it to be perfectly clear, and the evidence alluded to leaves no doubt upon my mind that he went over to *Paris* for a temporary purpose; that he never meant to reside there permanently; that his domicile, his establishment, his principal residence, was meant to be in this country; and he never abandoned it. Therefore I think that conclusion to which the *Master of the Rolls* came, with respect to his domicile, was perfectly right.

Then it becomes quite unnecessary to discuss the proposition as to the effect of the probate of the will in the Court of *Canterbury*. I do not know whether I should not agree with my noble and learned friend opposite, with a little explanation I have to give upon that subject, though I do not entirely agree with the proposition as laid down by him. I take it, that probate of a will in common form is conclusive evidence of the title of the executors to all personal property of which the testator was capable of disposing; it is also conclusive evidence that it was executed in due form according to the law of the country where he was domiciled at the time of the death, because it is beyond all question that the principle of *mobilia sequuntur personam* is completely and entirely established. I take it to be a perfectly clearly established proposition at this day, confirmed by the case of *Stanley v. Bernes* (y), that the succession must be regulated according to the law of that country where he was domiciled at the time of his death, and that to make a valid will it must be executed according to the forms of the law of that country. Therefore, a probate given in *Canterbury*, until revoked, must be considered as proof of the will being the will of a fully capable testator, and that it was executed according to the forms of the country in which he was domiciled at the time of his death. That I apprehend to be perfectly clear. If the will is proved in solemn form, as this was, the probate is incapable of being revoked, and the law of the domicile must be taken to be the law regulating the succession. At the same time, supposing it should turn out that in some particular country (which is, indeed, the case in *France* under certain circumstances, and in *Scotland*) that the testator had not the power of disposing of the whole of

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(y) 3 Hag. Ecc. Rep. 373.

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his personal property, then I agree with my noble and learned friend, that this instrument will only convey such property as, by the law of the country, he was entitled to dispose of by will. But it is conclusive evidence for that purpose. If it could be shown that there was a part that belonged to the widow and children by the law of that country where he was domiciled, the will would have no effect upon that part. It would be a nice question, what would be the effect of the probate if he died domiciled in a country where there was no power to make a will at all. My impression is still, that, until the probate was revoked in solemn form, it would still pass, as far as *England* was concerned, all the property to which the *English* law applied, and that the objection that he could not make any will at all ought to be set up in opposition to the will in the ecclesiastical court; and that it could not be set up in any way afterwards. I apprehend that my noble and learned friend will hardly dispute the qualification which I have added to the proposition which he has stated.

There remain, therefore, to be considered only two questions upon the construction of this will; and the reasons which have been given by both my noble and learned friends are so very clear and satisfactory, that it is really unnecessary for me to add anything. With respect to the property in *New South Wales* being liable to the Act of the 9th *Geo.* 2, it seems to me to be quite out of the question, for the reasons given by both my noble and learned friends, and in the Court below, which I think are perfectly satisfactory.

With respect to the construction to be given to the words in question in the will, I agree entirely in the opinion that the testator did not mean any part of his property to be devoted to the purposes of learning, unconnected with education, but that he meant it for education and

learning connected with education, it being part of the office of education to teach. The word "learning" is an equivocal word, not merely to the extent stated by my noble and learned friend on the woolsack, but to a much greater extent, for it means not only to learn in the ordinary sense, but also to teach. In the translation of the Scriptures, in the Psalms, for example, there are many instances of that sort. "Learning," therefore, I consider, in this case, equivalent to teaching; learning, as part of education. No portion of this charitable fund can be devoted by the trustees for the purpose of rewarding learned men, unconnected with education. It seems to me, therefore, that the conclusion which has been arrived at by the *Master of the Rolls* is perfectly right, and I agree entirely in the advice which has been given to your Lordships by my two noble and learned friends, both with respect to the construction of the will and with respect to the will not being subject to the Statute of Mortmain.

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Mr. Greene: Will your Lordships permit me to make an observation with regard to costs? The original Appellant sued *in formâ pauperis*, that continued down to the time of his death; therefore, I presume, your Lordships' order as to costs will begin from the time when the cause was revived.

The Orders and Decree appealed from were affirmed, and "the Appellant ordered to pay to the Respondents, who have answered the said appeal, the costs incurred by them in respect of the said appeal since the 24th *August* 1857, the date of the Order of this House, reviving the appeal in the name of the Appellant."

Lords' Journals, July 16, 1858.

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30.*Specific
Devisees and
Bequests.
Legacies.*PHILIP R. CONRON - - - - *Appellant.*CHRISTOPHER R. CONRON and others - *Respondents.*

Where there is a specific devise, or a specific legacy in a will, the presumption is that it is the intention of the testator that the devisee or legatee shall have it, as it is given, in its integrity and without derogation; and a general charge subsequently introduced in the will, which may in terms be capable of comprehending the specific devise or bequest, is not alone sufficient to take it away.

(*Spong v. Spong*, 1 Dow. & C. 365, approved of.

Mirehouse v. Scaife, 2 Myl. & Cr. 695, commented on.)

A testator residing in Ireland, who was possessed of real and personal property, made his will in *June* 1836, by which he devised certain freehold estates to trustees for a term of 99 years, to pay an annuity to his wife, and another annuity to one of his sons for life; the estate after the death of his son to go to the sons of that son in tail male. He gave other lands, some freehold, some leasehold, to other sons. He created annuities and gave legacies, directed the different properties devised and bequeathed to fall, in certain events, into his residuary estate, and at the end of his will directed that, "in case my personal and chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real and freehold estates, and I hereby charge and incumber the same with the payment thereof." In a codicil he said, "I charge and incumber all my estates of every description, both real and personal, with the following legacies;" and he gave to these legatees a power to distrain on any part of his estates or property of every description for the arrears of the interest due on the annuities given by the codicil:

Held, affirming a decree of the *Lord Chancellor of Ireland*, that the legacies were not charges on the specifically devised estates.

HATTON CONRON, of *Cork*, deceased, was possessed of large personal property, and he was likewise seised in fee of certain lands in *Ballincolig*, *Killalohy*, and *Kilpatrick*, and an estate in fee (subject to a jointure of 100 l. a year for his wife), in lands in *Barrack-street* and *Cove-*

street, in the city of *Cork*, of chattel interests in two parts of the lands of *Grange*, *Glankittane*, and *Ballynametagh*, and of a lease for lives, with covenant for perpetual renewal, in other parts of the lands of *Grange* and the lands of *Scarteen*. By his will, dated 22 *June* 1836, he devised the lands of *Ballincolig*, *Killalohy*, and *Kilpatrick* unto *Richard J. Copinger* and *John Galway* (whom he appointed the trustees of his will), for a term of ninety-nine years, in trust, to pay his wife for her life an annuity of 100*l.* (in addition to that which was secured to her on their marriage settlement), with power of distress to enforce payment; and after her death, in trust for the use of *Hatton Conron* (testator's eldest son), as to the said annuity, with such remainders as were afterwards appointed with respect to an annuity to *Christopher Conron*, and after his wife's decease, and payment of all arrears, the term was to cease; and he bequeathed her all his household furniture, plate, &c. and subject thereto, he bequeathed the said lands to the trustees for all his estate and interest therein, in trust, out of the rents, &c. to pay to *Christopher R. Conron* an annuity of 200*l.* for life, and after his death to apply the same to the use of the first son of the body of the said *Christopher Conron* and the heirs male of the body of such first son lawfully issuing, and for default of such issue, to the use of the other sons of the body of the said *Christopher*, &c., and for default, &c., to the use of the daughters of *Christopher*, share and share alike, as tenants in common, and in default of such issue of *Christopher*, then to *Hatton Conron*, who had always resided with the testator at *Grange*, his heirs and assigns for ever. And as to the residue of the rents, in trust to pay to the Respondent's other sons, *Robert*, *Edmond*, *Arthur* and *Philip* respectively, for their lives an annuity of 100*l.* each. And after the decease of any of the testator's last-mentioned sons,

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the annuity of such son so dying should go to the same uses and trusts thereinbefore declared of the annuity of 200 *l.*, and, in default of such trusts taking effect, each annuity was to go to *Hatton Conron*.

And as to the lands of *Ballincolig* so charged and chargeable with the annuities and rentcharges aforesaid, and also the *Barrack-street* and *Cove-street* estates (which were subject to the annuity to testator's wife, secured by the settlement), and his term and interest in the lands of *Grange* and liberties of *Cork*, he devised and bequeathed the same to his trustees, in trust for *Hatton Conron* for life, and after his decease, to the use of the first and other sons of the body of *Hatton* successively, according to seniority, in tail male, with power to *Hatton* to make leases and charge portions, and in default of issue of *Hatton Conron*, to each of the other sons, with like limitations, and in default of issue of all the sons, with like limitations to the daughters, as in the case of *Christopher's* children.

The testator gave legacies to his different daughters. The first was a legacy of 1,078 *l.* (*Ir.*) to *Geraldine Conron*, to be paid to her, with 4 *l.* per cent. interest, on the day of her marriage, but if she should die unmarried, it was to form part of the residuary estate. Two other daughters, *Mary* and *Anne Conron*, were to receive 3,000 *l.* each on the day of marriage, provided such marriage should be with the consent of the mother. Each of these two daughters was to have power by will (if unmarried) to dispose of 750 *l.* of the 3,000 *l.*, but the remainder, or, if the 750 *l.* were undisposed of, the whole, was to form part of the residuary property.

The testator gave the lands of *Bullynumetagh*, with the stock and farming utensils thereon, to *Robert Conron*, and also the sum of 500 *l.* in addition thereto; and he bequeathed to each of his sons, *Edmond*, *Arthur*, and *Philip*

(the Appellant), 1,000 l. (with four per cent. interest from the day of his death), in addition to the provision before made for them. In each of the legacies to *Mary, Anne, Robert, Edmond, Arthur, and Philip*, the testator declared that their respective shares in a sum of 3,000 l. bequeathed to them by *Thomas Rochford*, deceased, were included. And "I order and direct that the several sums thereby bequeathed to my said children, male and female, shall with all convenient speed after my decease be placed and invested in the purchase of Government stock in the English or Irish funds by my executors, hereinafter named. And I hereby charge and encumber all my real and chattel estates and property of every description with the payment of same, and hereby make same liable to the payment of such deficiency of interest as shall from time to time happen between the dividends payable on such Government stock and the said rate of four per cent. per annum. And I hereby direct that the several sums so hereby bequeathed to my said sons shall be paid and payable to each of them respectively on his attaining the age of twenty-one years; but if any or either of them shall happen to die without attaining such age, then it is my will that the sum so hereby bequeathed to him or them, on his or their attaining such age, shall sink into and form part of my residuary property." He then went on to make other provisions, one of which was the following, as to residue: "And as to all such rest, residue, and remainder of all such real and freehold estates, chattels real and personal, money, goods, and effects of every kind and nature whatsoever, and wheresoever situate, whereof I am now or at the time of my death shall be seised, &c., I give, &c. the same and every part thereof unto *Hatton Conron*, his heirs, executors, &c. for ever." And he revoked the annuity of 100 l. given to *Hatton* after the decease of his mother, "having given him hereby a life estate in the lands on which said

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annuity is charged, with remainder to his issue in ~~tail~~ male." " *And I direct that in case my personal and chat~~el~~ ~~el~~ property shall be inadequate to the payment of the pecunia~~ry~~ ~~y~~ legacies bequeathed by this my will, that the deficiency sh~~ould~~ ~~ould~~ be paid out of my real and freehold estates, and I here~~by~~ ~~by~~ in such case charge and encumber the same with the payme~~nt~~ ~~nt~~ thereof."*

He appointed his sons, *Hatton* and *Robert* and his daughters, *Geraldine* and *Mary*, to be executo~~r~~ ~~r~~ and executrixes of his will.

The testator afterwards executed two codicils: the fir~~st~~ ~~st~~ is immaterial. The second began, " *And I charge a~~nd~~ ~~nd~~ encumber all my estates of every description, both real a~~nd~~ ~~nd~~ personal, with the following legacies on the following co~~nd~~ ~~nd~~itions."*

He then left several sums (one of which w~~as~~ ~~as~~ a sum of 1,000 *l.* to *Philip*) "in addition," all to be pa~~y~~ ~~y~~able, with interest, at four per cent. "until my executo~~r~~ ~~r~~s can, with convenience, pay to each person the above sums, the interest to be paid half-yearly; and should not the interest on the above sums be regularly paid, I empower my executors and all those to whom I have left the above legacies, to distrain any part or parts of my estate and property of every description for the payment of the interest as it becomes due, the above legacies to remain chargeable on my several estates, payable as above, with interest at four per cent., half-yearly, until it shall be convenient to my heirs, executors or administrators to pay the principal sum as above left, but not before."

The testator died on the 29th *July* 1837, leaving his widow, *Hatton Conron* (his eldest son and heir-at-law), and five other sons, *Christopher*, *Robert*, *Edmond*, *Arthur*, and *Philip*, and five daughters, him surviving.

Probate was granted to *Hatton* and *Robert*, saving the rights of the other executors. On the 20th *August* 1850, *Christopher Conron* filed his bill (which was afterwards amended) in the Court of Chancery in *Ireland*, setting

forth the will, alleging that the trustees had renounced the will and the trusts thereof, and praying that the will might be established; that the annuity of 200 *l.* devised to him might be declared to be well charged upon the lands in the will mentioned, and for an account of the legacies and of the parts thereof charged upon the lands, and for an account and general relief. Answers were put in, and the cause came on to be heard on the 21st *June* 1852, before the *Lord Chancellor of Ireland*, when a decree was pronounced, whereby it was referred to *William Brooke, Esq.*, one of the Masters, to take an account of the sum due to the complainant, of the personal estates of the testator, of the debts and legacies, of the real estates, of the rents accrued since his death, and of the charges and encumbrances affecting the same.

On the 1st *July* 1854, the *Master* made his report, and after taking the various accounts, he found that the legacies due to the Appellant *Philip*, and to *Edmond* and *Arthur* (each in equal priority), were a second charge on the *Barrack-street* and *Cove-street* property, and a first charge on the lands of *Ballincolig, Killalohy, and Kilpatrick*, as well as upon all the other estates and properties of the testator specifically devised and bequeathed by the will, and that all the estates were bound to contribute rateably to the payment of the legacies according to their respective values at the time of the testator's death, and, as between the several annuities chargeable upon the said lands of *Bullincolig, Killalohy, and Kilpatrick*, and the legacies remaining due to *Edmond, Arthur, and Philip*, that *Christopher* and the other annuitants, and the specific devisees in respect of the specific estates and properties specifically devised and bequeathed to them, were bound to contribute to the payment of the said legacies rateably, according to the respective values they took under the will at the testator's decease.

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The Plaintiff, *Christopher Conron*, filed five exceptions to this report: First, that priority had been given to ~~the~~ legacies due to *Edmond* over the annuity of 200 l. due to the Plaintiff. Second, that Plaintiff's annuity was ~~not~~ bound to contribute to the payment of the legacies till ~~the~~ other annuities were exhausted. Third, that the several annuitants were only bound to contribute in the event of the testator's estate in the lands of *Ballincolig*, *Killaloe*, ~~y.~~ and *Kilpatrick* proving insufficient to pay the legacies. Fourth, that the legacies payable to *Edmond*, *Arthur*, ~~and~~ *Philip* (the Appellant) ought not to have been ~~found~~ chargeable on the said lands. Fifth, that the rate of ~~con~~tribution was, with respect to the lands named, erroneously fixed by reference to the value of the lands at the date of the testator's death.

Robert Conron filed two exceptions, and *Hatton Conron* three exceptions to the report. The first was, that the legacies were erroneously declared to be charges on the lands of *Ballinametagh*, *Grange*, *Barrack-street*, and *Cove-street*, and the other lands specifically devised by the will, such legacies being only payable out of the general personal estate of the testator, and out of the residuary estate. The other exceptions related to allowing them certain charges in respect of payments made, and are not material to be considered.

These exceptions were heard before the *Lord Chancellor*, who, on the 17th *November* 1854, made a farther decree in the cause, by which he allowed the Plaintiff's fourth exception, but made no order as to the others. His Lordship likewise allowed the first exception of *Robert* and of *Hatton Conron*, and directed the others to stand over, with liberty to them to file farther charges, if they should be so advised, and the *Master* was ordered to review his report, so far as was rendered necessary by the rulings

On the above exceptions. There was another report, and other exceptions were filed, and the cause came on to be heard upon them, and on the merits, on the 7th November 1855, when the previous decree was in substance confirmed. This appeal was then brought.

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Sir R. Bethell and Mr. Cole for the Appellant :

The words of charge used in this will are very comprehensive, and mean the property of every description left by the testator, whether specifically devised or not, all of which was affected the instant that the will of the testator came into operation. The case relied on in the Court below was that of *Spong v. Spong (a)*, but that was misapprehended. It was quoted from *Bligh's Reports*, but there the residuary clause on which the case chiefly turned, as it removed all doubt respecting the intention of the testator, is omitted. Besides, in that case such charges as were meant to be fixed upon the specifically devised real estates were expressly mentioned. That case was, therefore, decided on the application of the rule, *Expressio unius est exclusio alterius*, a rule which cannot be applied here. On that ground, that decision is intelligible. Lord *Manners* said, that he had consulted Lords *Eldon* and *Redesdale* ; but in the subsequent case of *Mirehouse v. Scaife (b)*, Lord *Cottenham*, in observing upon that decision, remarks, that though those noble and learned Lords might have concurred in the judgment, it by no means followed that they concurred in the reasons (c), and his

(a) 1 Dow. & Clark, 365 ; 3 Bl. N. S. 84.

(b) 2 Myl. & Cr. 695, 704.

(c) Lord *Manners* refers also to Lord *Lyndhurst*, and says, 1 Dow. & C. 378 ; 3 Bl. N. S. 107 : " I stated at the time of the hearing of this case that I would not give a final opinion on it in the absence of the noble and learned Lord on the woolsack (Lord *Lyndhurst*) ; he is

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Lordship goes on to comment on a rule supposed to have been declared by Lord *Manners*, and says, that at best it is but a dictum. Till the late statute, every residuary devise was necessarily specific; the will operated on property which the testator had at the time of making it, but not on any which he afterwards acquired, and that was a plain reason why all such devises were held to be specific. The case of *Hanby v. Roberts* (*d*), is mistaken by Lord *Manners*, when he is commenting on the supposed "distinction between property specifically devised and real estate which passes under a residuary clause" (*e*). He says, that Lord *Hardwicke*, in that case, recognises "the distinction in the marshalling of assets, and it is a distinction which appears to me very obvious, and very decisive of this case." But this is not a case of marshalling of assets. A charge of a legacy on real estate is a devise to the legatee, who could not come on the real estate without such charge. In *Mirehouse v. Scaife* (*f*), Lord *Cottenham* declined to follow *Spong v. Spong*, treating it as a case which was decided on the peculiar expressions contained in that will; and such, too, must be taken to be the opinion of Lord Chancellor *Sugden* in *Young v. Hassard* (*g*). That was a devise of fee-simple lands and of leaseholds to *Young* and his issue, and then of other fee-simple lands to *Hassard* and her issue, and the testatrix charged all the lands so devised with the payment of the annuities bequeathed by her will. The fee-simple lands were held liable, but the leasehold lands were held not liable in the first instance. It is clear that there Lord Chancellor *Sugden* treated the decision in

now present; I have communicated with him on the subject of the case, and also with Lords *Eldon* and *Redesdale*, and they agree with me in opinion."

(*d*) Ambl. 127.

(*e*) 3 Bli. N.S. 105.

(*f*) 2 Myl. & Cr. 695.

(*g*) 1 Jo. & Lat. 466.

Spong v. Spong as proceeding on the words of the particular will. And so he treated it in his work on the "Law of Property" (h).

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So in *Creed v. Creed* (i), it is plain that the decision proceeded upon the particular words of the will. That was a question of the priority of annuities over legacies. There an estate at B. was given to the testator's wife, and an annuity was likewise created in her favour. An annuity was in a similar way given to his sister. Both were charged on all the real estates, except B. Legacies were then given, payable out of the residue of the personal estate, and, in deficiency thereof, out of the real estates, except B. The personal estate was insufficient to pay the debts and legacies, and the real estate was insufficient to pay the annuities and legacies. On the construction of that will, the annuities were held entitled to priority over the legacies, but that was upon the special intention plainly expressed in the will, and the ruling does not apply here, where no such expression exists.

Assuming that this case is to be decided on the question of intention, then it is submitted that the words here are general, and cannot have a restricted interpretation. Such an interpretation cannot be put upon them without introducing other words not found in the will. It will be said, on the other side, that if the legacies are to be considered as a charge on all the estates, they must be subordinate to the annuities. That is doubtful; but, even if so, it would not affect their character as charges on the real estate. The words, "all my estates," must have their natural meaning, and be treated as comprehending all the testator's estate and his interests therein, whether specifically devised or not. The testator has but one estate,

(h) P. 427.

(i) 11 Clark & F. 491.

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that of *Scarteen*, which is not the subject of a specific devise. If the words he has used are not to have their natural meaning, they will be confined in their application to *Scarteen*, which never could have been intended; they must have their natural meaning, and must equally apply to his other estates.

Mr. *R. Palmer* and Mr. *Arthur Hobhouse* for the Respondents:

Where a specific gift has once been made, as is the case here, it cannot be revoked except by a clear expression of intention. To throw these charges on these specific gifts would be, in effect, to revoke the gifts. General words of charge will not be sufficient for that purpose. The case of *Spong v. Spong* is decisive of the present, and it cannot be distinguished, and will not be overruled. If every part of the property here is charged, then the furniture and plate, expressly given to the wife, must be taken, for all must be exhausted before coming on the real estate, which is only to make good a deficiency. That would be in effect to revoke the specific gift to the wife. Such was certainly not the intention of the testator. The general rule is, that where there is a specific legacy of personalty or devise of land, the land and personalty must be applied rateably in payment of specialty debts: *Long v. Short* (*j*), *Tombs v. Roch* (*k*); but that will not make the land subject to pecuniary legacies. It has been said here, that *Spong v. Spong* is only to be understood because there is a specific charge of a particular thing on a particular estate, and that it goes entirely on the intention shown in that particular will. But that is the case here, for *Ballincolig*, *Killalohy* and *Kilpatrick* are ex-

(*j*) 1 P. Wms. 403.

(*k*) 2 Coll. Ch. C. 490.

expressly charged with particular annuities. Where they are not so expressly charged they cannot be made liable. The same observation applies to the *Berwick-street* and *Cove-street* estates. The residuary property is that alone which the testator intended should sustain diminution. Every legacy is to sink into that, and it is that alone which the testator meant by the words "real and personal estate." This is like the case of *Hedges v. Blicke* (l) before the Lords Justices a few days ago. There the testator directed his executors to pay to each of his five daughters 400 l. a year for life; and after the death of any one, her children were to have their parent's share; and if any of the daughters should die without issue, the share was to sink into the residue. There the Lords Justices held, overruling *Blewitt v. Roberts* (m), and acting on *Stokes v. Heron* (n), that the annuities created were perpetual annuities, and not merely life annuities (o). The absurdity of a different construction in the present case is shown by this: the testator gives the farm and lands of *Ballynamagh*, which was a gift of a chattel interest, to *Robert*, and also a sum of 500 l., which is expressly given because the farm was only a leasehold. The argument on the other side would make the farm, farming stock, and utensils liable to be taken away to pay the 500 l. No such intention can be attributed to the testator. If there was a deficiency, the other words of the will show that it is to be made up out of the residue.

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The authorities do not support the argument on the other side. *Hanby v. Roberts* only illustrates the difference between a specific gift of the entirety and a specific

(l) 27 Law Journ. N. S. Ch. 742.

(n) 12 Clark & F. 161.

(m) 110 Sim. 491; 1 Cr. & Ph. 274.

(o) See also *Mansergh v. Campbell*, 27 Law J. N. S. Ch. 769.

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gift of the residue of real estate. The cases before *Alvanley* went to the same point. In *Joy v. Campbell* Lord *Redesdale* held that a specific devise or a specific legatee was not to contribute to make up a pecuniary legacy, except upon an intention clearly expressed to effect.

That was the rule followed in *Kightley v. Kightley* and in *Birmingham v. Kirwan* (r). In the former it was held that a direction, "that all my legal debts, and legal and funeral expenses shall be fully paid," was not sufficient to charge the legacies on real estate specifically devised, for that such an intent was not there clearly expressed. In the latter the testator devised his freehold land to trustees, to permit his wife to hold the same for her life, to pay her a certain rent, and he devised the residue of the said land to "subject to the payment of his debts and legacies aforesaid, to the use of *J. B.* for life, remainder to *N.* his heirs, &c.": it was held, that the charge did not affect the life interest of the wife. There is no real distinction between *Spong v. Spong* and the present case; but the authorities show, that even if that case had never been determined, the principles of legal reasoning there laid forward by Lord *Manners* would be decisive in favour of these Respondents. *Mirehouse v. Scaife* (s) introduces doubt as to *Spong v. Spong*, but only shows that it was not applicable to the particular case which was then under Lord *Cottenham's* consideration. His Lordship, so far from doubting the authority of *Spong v. Spong*, was re-inclined, in *Creed v. Creed* (t), to press it beyond its natural limits. Though Lord *St. Leonards*, in his

(p) 1 Sch. & Lef. 339, more fully reported from *MS.* of Mr. Beatty, in a note to *Spong v. Spong*, 3 Bli. N. S. 111.

(q) 2 Ves. J. 328.

(r) 2 Sch. & Lef. 444.

(s) 2 Myl. & Cr. 695.

(t) 11 Clark & F. 491, 5

on the "Law of Property," examines *Spong v. Spong*, he does not intimate his dissent from it (*u*); and in *Barry v. Harding* (*v*), his Lordship, after correcting Mr. Bligh's report of *Spong v. Spong*, adopts that case, and says, "There is no such rule as that in no case can a specific legacy be charged with a pecuniary legacy; but I agree that specific legacies are not to be so charged, except where a clear and distinct intention appears." It is a plain rule of construction, that mere general words will not have an effect at variance with clear intention expressed in a former part of the same instrument: *Torre v. Browne* (*w*), *Johnson v. Telford* (*x*), and *Allen v. Anderson* (*y*); and this doctrine is well illustrated in *Pomfret v. Perring* (*z*). On authority, therefore, as well as principle, the decision here is correct.

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Sir *R. Bethell*, in reply :

The words, "all my estates," are so comprehensive that no estate, of whatever kind, possessed by the testator can escape from the operation of them. The use of those words sufficiently expresses what was his real intention. It is not contended that they revoke the preceding devise, but they must be construed as accompanying and qualifying it, although it may be observed that if there are two devises in a will differing from each other, the latter must prevail, and here the words creating this charge occur in the latter part of the will. Real estates are not generally the funds for the payment of legacies, but may be made so by the peculiar words of the will. They are made so here. The case of *Spong v. Spong* does not govern the present, for there the question was as to the intention expressed

(*u*) Law of Property, 422 *et seq*
(*v*) 1 Jo. & Lat. 475, 496.
(*w*) 5 H. L. Cas. 555, 570.

(*x*) 1 Russ. & Myl. 244.
(*y*) 5 Hare, 163.
(*z*) 5 De G. M. & Gord. 775.

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in the will, and the intention to create the charge was held not to have been sufficiently expressed; the words of the two wills are entirely different. Where a charge of legacies does exist, it must be treated as a substantive devise. Where there is a charge by the testator upon all his estates for payment of his debts, the devisee of a particular estate must take subject to that charge: *Clark v. Sewell* (a). As between the parties here, this devise of legacies is equivalent to a charge of debts. In *Rowley v. Fyton* (b), a testator charged all his estates with payment of his debts, and made his son residuary devisee; he afterwards bought other estates, which he made the subject of a devise to his son in a codicil. The codicil was held to be a republication of the will, and the after purchased estates were held to be charged. There is no doubt as to the rule stated by Lord St. Leonards in *Barry v. Harding* (c); but it does not apply here.

The *Lord Chancellor* (Lord *Chelmsford*), after stating the case, said :

30 July.

It was contended on the part of the Appellant, that the general words of charge in the will, "I hereby charge and encumber *all* my real and chattel estates," and in the codicil, "I charge and encumber all my estates of every description," manifested so clear and decided an intention to give a priority to these pecuniary legacies over the annuities and specific bequests and devises in the will, as to leave no other duty to a court of construction than to obey implicitly what the testator has so distinctly declared. And it was also contended that the *Lord Chancellor* of *Ireland* had miscarried in his judgment by following implicitly the false lights held out to him by the reasonings

(a) 3 Atk. 101.

(b) 2 Mer. 128.

(c) 1 Jo. & Lat. 475, 496.

which led this House to its decision in the case of *Spong v. Spong* (*d*). It was evident, from the learned counsel for the Appellant directing the whole force of his argument against this case, that he felt it necessary to remove it out of his way before he could hope to succeed in obtaining a reversal of the decree.

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It will be right, therefore, to consider the case of *Spong v. Spong* with some attention, in order to ascertain what were the grounds of the decision, and whether it can be successfully distinguished from the present case. There is a very close resemblance between many of the bequests and devises in the wills in *Spong v. Spong* and in this case. In both there is a bequest to the wife of the household furniture, wines, movables, and other effects, and also of an annuity, and in both there is a devise to the son of certain lands charged with the payment of annuities, and also a residuary devise to him of all the real and personal estate. And the terms in which the legacies are charged upon the real and personal estate are equally general in both cases, the addition of the words "all" and "of every description" in this will making no substantial difference in the extent of the property described. Such was the opinion of Chief Baron *Alexander*, who, in originally deciding that case, said, "The natural effect of the words seems quite plain; it has nothing doubtful or equivocal. Here is no limitation, no exception, no exclusion of any particular lands. It is the same as if he had said, 'all my real and personal estate.' " Upon this ground he decided that he could see no difference in the will between the specific and the residuary devise, and that both were chargeable with the legacies. He was perplexed with the legacy of the furniture to the wife; and hardly knowing

(*d*) 3 Bli. N. S. 84; 1 Dow. & Clark, 365.

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how to deal with it so as to render the intention of the testator consistent, he says, "The whole effect of the provision is so extraordinary, that I cannot help suspecting that a provision attended by these consequences was introduced by mistake, or that by mistake some words have been omitted." The difficulty of reconciling the provisions of the will upon the construction which the *Chief Baron* proceeded upon might have led us to anticipate that other minds might find in these conflicting and irreconcilable intentions the necessity for a different construction from that which he adopted. And accordingly Lord *Manners*, who advised your Lordships in the case of *Spong v. Spong*, arrived at a totally different conclusion; and, upon grounds which can be satisfactorily sustained by reasoning, held that the lands specifically devised were not liable to the payment of the legacies. He says (c), "I think there is a marked and obvious distinction between property specifically devised, and real estate which passes under a residuary clause. In the first case, a testator, by specifically devising or specifically bequeathing any part of his property, intends, as between the objects of his bounty, to separate that part of his property from the rest, and that it should not be subjected to the provisions and operation of his will. Whereas, in a residuary devise, as in the present case, it is quite the reverse. The devisee must take it subject to all the provisions and encumbrances charged upon the land. In the one case the devisee takes the specific thing devised, in the other case the residuary devisee takes such part of the real property as shall remain after satisfying the charges and encumbrances affecting the real estate. The cases therefore appear to me most materially different. By

(c) 3 Bligh's N. S. 105.

the general rule, a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule applicable to a residue. A residue of a real estate is so far specific that it must be in the possession or in the power of the testator to devise it at the time of making his will, and upon the lapse of any specific devise it will not fall into the residue; but in other respects it is merely residue, and this is its character." Farther on he says, "With respect to the case of *Campbell v. Joy*, which was supposed to be a decision upon the point, in that case there does not appear to be an express charge, so as to amount completely and entirely to an authority upon the point; but I have inquired of Lord *Redesdale* what we are to understand by his stating in that case, 'that it would be understood by counsel, that it would be contrary to principle to charge a specific part of an estate called *Thorne* with the payment of legacies.' His answer was, that what he meant by its being against principle was, that it was an established rule of the Court that a specific devisee or a specific legatee was not to contribute to make up a pecuniary legacy; and that that is what he meant to lay down in that case. Now if the testator had intended to prefer the pecuniary legatee to the specific devisee or specific legatee, and had, by his will, expressed that intention, or if that intention must be necessarily implied from the context of the will, there is no doubt the Court would have given effect to that intention, and have decided accordingly. But the rule of construction, when this intention is not expressed, is, that the pecuniary legatee cannot resort to property that is specifically disposed of. That was the opinion of Lord *Eldon* in this case, and it was the opinion of Lord *Redesdale*, in which I perfectly concur, having had the advantage of hearing all the arguments upon the subject."

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My Lords, the principle which I collect from that case

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is, that where there is a specific legacy or devise once given in a will, the presumption is that it is the intention of the testator that the legatee or devisee should have it as it is given, in its integrity, and without derogation, and that a general charge, which in terms may comprehend the specific bequest or devise, is not sufficient of itself to show an intention to take it away again. It is unnecessary to go back to the cases prior to *Spong v. Spong*. Notwithstanding the strong observations which have been made upon the reasoning on which it proceeded, I am not aware that it has ever been questioned, or the propriety of the conclusion, to which the House was conducted by Lord *Manners*, ever doubted. My noble and learned friend, Lord *St. Leonards*, who, in his treatise on the "Law of Property as administered by the House of Lords," has freely canvassed the decisions of your Lordships' House, and who argued for the party who was ultimately successful in *Spong v. Spong*, has stated that case, and the arguments on both sides, without expressing any disapprobation of the decision. In the cases also of *Young v. Hassard* (*f*), and *Barry v. Harding* (*g*), he treated *Spong v. Spong* as an authority which rested upon satisfactory grounds; and, in the latter case, he says, "the case very much turned on the gift of the residue of the real and personal estate to *Thomas Spong*." If any observations to the disparagement of this authority are supposed to have proceeded from Lord *Cottenham* in the case of *Mirehouse v. Scaife* (*h*), they are in some degree weakened by his inaccuracy as to the nature of the case. And the objection which he makes to the dictum of Lord *Manners*, if it was intended to apply to a case of marshalling assets, fails altogether, as it is clear that it had a totally different application. At all events, in *Creed v.*

(*f*) 1 Jo. & Lat. 466.

(*h*) 2 Myl. & Cra. 704.

(*g*) Id. 475.

Creed(i), Lord *Cottenham* showed no indisposition to follow *Spong v. Spong*, and even perhaps to go beyond it.

I have thought it right to enter so much at length into an examination of this case on account of its having been so seriously assailed in the argument at your Lordships' bar, for it is of little value as a decision between the parties, if the reasoning upon which it proceeded cannot be justified and made useful for general application.

Turning, then, from the consideration of the authority on which the *Lord Chancellor of Ireland* is said to have founded his judgment in this case, to the will in question, are there to be discovered such clear indications of intention as will enable your Lordships to arrive at a satisfactory conclusion whether the testator meant to charge the property specifically devised and bequeathed with the pecuniary legacies or not? Of course the construction is to be made, not upon isolated passages, but upon the whole will. The words of charge are as general and comprehensive as possible, and embrace every description of property; and yet it is evident, from other parts of the will, that this could not have been the intention of the testator. The term of 99 years, for instance, which he had so studiously and carefully created for the purpose of paying the annuity to his "dearly beloved wife," for her support and maintenance, would have to bear the burthen of these legacies, as would the bequest of the household furniture, plate, linen, china, glass, and other household goods, with which the *Chief Baron* found it so difficult to deal in *Spong v. Spong*. Nor do I think it unimportant, as indicative of intention, that all the bequests to his children, upon the failure of persons entitled to them, are directed to "sink into and form part of his residuary property," words

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(i) 11 Clark & F. 491.

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which seem to point to the source from which they were to spring. I consider, also, that the bequest to his son *Robert*, is an important circumstance in ascertaining his intention. It seems evident that he meant to bestow his bounty equally on his sons, *Robert*, *Edmond*, *Arthur*, and *Philip*, and giving to the last three 1,000 *l.* each, he left to *Robert* the farm and lands of *Ballynametagh*, and the sum of 500 *l.* sterling in addition, evidently considering that the farm, with the pecuniary legacy together, would place him on an equality with his brothers. But then according to the construction contended for, no sooner had he made this equal distribution of his bounty than he charges the farm with all the legacies, and *Robert's* own legacy amongst the rest, which would at once defeat his purpose, and reduce *Robert* much below the others.

It was suggested in the course of the argument that *Spong v. Spong* might be supported upon a reasonable ground, on account of the property specifically devised being charged with particular annuities and legacies, and it was also said that it might well be held that the remaining legacies were not chargeable upon it, on the principle of *Expressio unius est exclusio alterius*. But if that was the ground of the decision in *Spong v. Spong*, the same circumstance is to be found here, as the lands *Ballincolig*, *Killalohy*, and *Kilpatrick* are expressly stated to be "charged and chargeable with the said annuities and yearly rent-charges." In short, there is scarcely any difference between the two cases, except the power which was contained in the codicil in this case, for the executors and legatees to distrain upon any part or parts of his estate and property of every description for the payment of the interest on the legacies given by this codicil. I do not think that this power of distress to enforce the payment of the interest carries the case away from *Spong v. Spong*.

from which I am unable to distinguish it. And, looking at the whole tenor of the will, I can find no proof of intention sufficiently strong to counteract the presumption that specific devises and bequests are intended to be given as they are expressed, and are not to be subject to the influence of mere general words of charge; and I have no difficulty, therefore, in giving a meaning to the charge in the will and codicil, which will confine it to the residuary estate, real and personal.

This view of the extent of the charge of the legacies upon the testator's property disposes of the whole case; for, although some questions have been raised as to the payment, by the executors, of the legacies to other legatees, leaving the Appellant's legacies unpaid, whatever opinion may be entertained of the Appellant's rights in this respect, they cannot be the subject of determination in the present suit. This is not an administration suit, but a bill filed by *Christopher* for the purpose of having a declaration that his annuity was well charged upon the lands; and although he prays for an account to be taken, amongst other things, of the legacies and of the parts thereof charged upon the lands, yet it is merely with reference to his annuity, and nothing else. The *Lord Chancellor of Ireland* was quite right in decreeing that the proceedings taken and had in the cause should not prejudice or affect the rights of the Appellant, or of the other unpaid legatees, to institute any other suit or proceeding they might respectively be advised for payment of their legacies. This payment could not be enforced in the present suit, and therefore the objections to the decree upon the minor grounds entirely fail; I recommend, therefore, that the decrees should be affirmed, with costs.

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Lord *Cramworth* :

My Lords, I have very little to add to what has just fallen from my noble and learned friend. The truth is, that this appeal could only be sustained if the Appellant could successfully impeach the decision of this House in the case of *Spong v. Spong*, for, in principle, this case is undistinguishable from that. Now I am not only of opinion that it would be very unsafe, as a general rule, for us to depart from a decision which has been deliberately pronounced in this House, unless some substantial distinction between it and the case under consideration could be established, but I go beyond that, and I say, that if the case of *Spong v. Spong* had never been decided, I think that the principle upon which it was decided is a perfectly correct principle, and ought to be established in this case, even if there had not been that authority to go upon.

The true rule which I consider to be deducible from the case of *Spong v. Spong* is that a mere charge of legacies on the real and personal estate (and “on *all* the real and personal estate” must mean exactly the same thing) does not of itself create a charge on any specific devise or bequest. I think that the rule is a very reasonable one, and is likely to be, in general, conformable to the intentions of testators. When any specific thing is given, it must be, in general, understood that the devisee is meant to take it in its integrity. No one would question this in the case of the bequest of a chattel, a horse, for instance, a watch, a picture, and so, I think, as to a house or a farm. A general charge “on all my real and personal estate” must be read as a charge on all which I have not otherwise disposed of. And probably no violence is done to the language, for the testator may not consider what he has already devised or bequeathed as properly coming under the description of part of “my estate.” The question must always be one

of intention, but the rule is, that the presumption is against an intention to charge lands specifically devised, and that a mere charge "on all my lands" is not sufficient to rebut that presumption.

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This rule was not established by any means for the first time in *Spong v. Spong*. I consider it to have been clearly laid down as law by Lord *Redesdale*, or to have been intimated by him to be, in his opinion, law, in the case of *Joy v. Campbell*, which was referred to in the argument. That passage in Lord *Redesdale*'s judgment, which is remarked upon by Lord *St. Leonards*, in the case referred to by my noble and learned friend, of *Barry v. Harding*, is, I think, properly corrected by a reference to what must have been the expression used by Lord *Redesdale*, according to what he is reported by Lord *Manners* to have stated, when communicated with upon the subject at the time of the decision of the case of *Spong v. Spong*. Lord *Redesdale*'s observation is this: "On the other part of the case, the funds for paying the demands are only the property passing under the residuary bequest, after the specific bequest to *Thomas Brown* (that is, the specific bequest of the tenement in *Waring-street*, and of a life interest in the *Thorne*). It is attempted in the subsequent part of the will to charge this, but that is against principle. It is a legacy as much as any other, and it cannot be considered that the testator meant to give that specifically, and yet to subject it, in some manner, as if it formed part of the residue." Now, Lord *St. Leonards* says (which is clearly borne out by the explanation of Lord *Redesdale*, as reported by Lord *Manners* in the case of *Spong v. Spong*), "Clearly what Lord *Redesdale* said was this, 'It is attempted from the subsequent part of the will to say that this is charged.'" I have no doubt that that is either what the noble and learned Lord said, or what he must

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However, was done. Then the result was, that the Appellant, not being a party to the suit, brought in a claim as a legatee, thinking that as a legatee he had a claim against the real estate. The Defendant filed a discharge, and in the first instance he reiterated the error which he had fallen into in his answer, stating that the legacies were charged upon the real estate; but afterwards he got permission, I presume, to file an amended discharge, and here he intimated a doubt whether what he had stated before was correct. Upon that the *Master* made his report; and not very accurately, according to our notions of proceeding, took upon himself to report that the legacies were well charged upon the real estate; a matter, I apprehend, entirely out of his province. Upon that, exceptions were taken by, amongst other persons, the present Respondent, Mr. *Hatton Conron*, he having before that time pointed out the error into which all parties had fallen in the origin of the cause; and there was an order of the *Lord Chancellor* setting the matter right, allowing that exception, and saying, in truth, everybody has been in error; there is no charge whatever upon the real estate, so far as the legacies are concerned. Then he referred it back to the *Master* to review his report. The *Master* did review his report upon matters not material to the present purpose, because they chiefly related to the rights of the several defendants entitled to the real estate, or charged upon the real estate *inter se*. Upon that subsequent report coming in, the Appellant filed his exceptions, the fourth being one which revived the question, whether this was a charge upon the real estate; and also raised the point, that if it was not a charge upon the real estate, still he had rights, because the other legatees had been paid in full. The *Lord Chancellor* upon that adhered, as he would naturally adhere, to the decision which he had very correctly made,

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have meant. He could not have meant to lay down as a general proposition that it was not competent to a testator to charge property which he had specifically bequeathed, but merely to say, that it was so little in conformity with the general habits of testators, that that was not to be presumed.

That being so, the question is, whether here there is anything to raise such a presumption. Now, so far from that being the case, I think, for the reasons which have been pointed out by my noble and learned friend (I shall not go over them again), that even if there had been no such general rule as that established in *Spong v. Spong*, there are circumstances here which show that there was no such intention to create a general charge on the specific devise.

Now, with regard to the minor points which were raised chiefly by Mr. *Cole* in argument, they have also been disposed of by my noble and learned friend; and it is not necessary for me to say much upon the subject. It was clearly no part of the object of this bill to obtain the administration of the testator's estate. In fact, the Plaintiff's legacy had been paid; and supposing, as he did, that the real estate was liable to the payment of legacies, the only object which he had was to see that the legacies, if possible, should be paid from some other source, in order that the real estate might not be affected; and with that view he filed his bill. But both the Plaintiff and the Defendant fell into the common error of supposing that there was such a charge; and I must observe that, having fallen into that common error, they not unnaturally led the Court of Chancery in *Ireland* into a similar error; because it was obviously wrong in the original decree to direct advertisements for creditors and legatees to come in. There was no reason for taking such a course. That,

however, was done. Then the result was, that the Appellant, not being a party to the suit, brought in a claim as a legatee, thinking that as a legatee he had a claim against the real estate. The Defendant filed a discharge, and in the first instance he reiterated the error which he had fallen into in his answer, stating that the legacies were charged upon the real estate; but afterwards he got permission, I presume, to file an amended discharge, and there he intimated a doubt whether what he had stated before was correct. Upon that the *Master* made his report; and not very accurately, according to our notions of proceeding, took upon himself to report that the legacies were well charged upon the real estate; a matter, I apprehend, entirely out of his province. Upon that, exceptions were taken by, amongst other persons, the present Respondent, Mr. *Hatton Conron*, he having before that time found out the error into which all parties had fallen in the origin of the cause; and there was an order of the *Lord Chancellor* setting the matter right, allowing that exception, and saying, in truth, everybody has been in error; there is no charge whatever upon the real estate, so far as the legacies are concerned. Then he referred it back to the *Master* to review his report. The *Master* did review his report upon matters not material to the present purpose, because they chiefly related to the rights of the several defendants entitled to the real estate, or charged upon the real estate *inter se*. Upon that subsequent report coming in, the Appellant filed his exceptions, the fourth being one which revived the question, whether this was a charge upon the real estate; and also raised the point, that if it was not a charge upon the real estate, still he had rights, because the other legatees had been paid in full. The *Lord Chancellor* upon that adhered, as he would naturally adhere, to the decision which he had very correctly made,

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that there was no charge upon the real estate; and then, with reference to the other point, very properly said, "We have nothing to do with it in this suit; this is not a suit for the payment of legacies at all." Therefore he overruled the exceptions, with costs, with a very proper declaration (not perhaps necessary, but very convenient to prevent all possible dispute), that he did not mean, by overruling that exception, to prevent the present Appellant from instituting any suit which he should be advised to institute for the purpose of getting his legacy paid out of the personal estate, to effect which the present suit was quite inadequate.

It appears to me, therefore, that the order of the *Lord Chancellor of Ireland* was perfectly correct, and that this appeal has been most needlessly brought before your Lordships; and I quite concur with my noble and learned friend that it ought to be dismissed, with costs.

Lords' Journals, *July* 30.

The DIRECTORS, &c., of the BRISTOL
 and EXETER RAILWAY - - - *Appellants.*
 ROBERT CANNING COLLINS - - - *Respondent.*

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 Feb. 14, 15.
 June 11.
 July 27.
 ———
*Railway
 Company.
 Contract.
 Practice.*

At the *Bath* station of the Great Western Railway Company goods were received for the purpose of being forwarded to *Torquay*. The line of that company ends at *Bristol*, at which place the line of the Bristol and Exeter Company begins. The goods would have to be put on a third railway before reaching *Torquay*. The receipt given at *Bath* was thus headed: "To the Great Western Railway Company: Receive the undermentioned goods on the conditions stated on the other side. To be sent to *Torquay* station and delivered to *R. C. Collins*, consignee, or his agent." The Great Western Company received the carriage money for the whole distance from *Bath* to *Torquay*. On the arrival of the goods at

Bristol they were put on the line of the *Bristol and Exeter Company*, where they were destroyed by fire. An action was brought against this latter company to recover compensation for the loss :
Held, That the contract was with the Great Western Company alone, and that the *Bristol and Exeter Company* was not liable.

After a verdict for the Plaintiff in this case, a rule to enter a nonsuit was obtained, and the grounds were stated to be "that the goods lost or damaged were received and carried by the Defendants under a contract, by the conditions of which the Defendants were not liable for loss or damage by fire." A judgment was given, which was reversed in the Exchequer Chamber, and the case was brought up to this House :

Held, That it was competent to the *Bristol and Exeter Company* on the hearing of the case here to discuss the question, whether any contract whatever existed as between itself and the Plaintiff.

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THIS was an appeal under the Common Law Procedure Act of 1854. On the 30th October 1854, *Collins* brought an action against the Appellants to recover the value of certain goods which, while on their railway, were destroyed by fire. The first count of the declaration, after alleging that the Appellants (the Defendants in the action) were common carriers of goods for hire, stated that *Collins* delivered to them, and they accepted and received the same, a van containing goods, to be conveyed to *Torquay*, and there delivered to *Collins*, for reward, &c. Breach, that they did not safely convey the van and goods, nor safely deliver the same. There were several other counts, but they are not material to be considered. The Defendants pleaded not guilty, and ten other pleas. The fifth alone need be noticed. This was, in substance, that before the goods were delivered to the Defendants it was agreed between the Plaintiff and the Great Western Railway Company, as agent for the Defendants, that the reward to be paid to the Defendants for the conveyance and delivery of the goods should be a less sum than the reasonable

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reward payable to the Defendants for safely conveying and delivering the same, and that the Plaintiff should pay, and the Defendants accept, such less sum, in consideration of the special terms (among other things) that the Defendants would not be answerable for the loss of or damage to any goods arising from fire, and that the loss did arise from fire.

Issue being joined on these pleas, the cause was tried before Mr. Justice *Williams*, at the *Somerset* assizes, in *August* 1855, when it appeared that *Collins* was a carrier, residing at *Bath*, and delivered at the station of the Great Western Railway Company there, a van load of furniture, to be conveyed to *Torquay*, on which occasion he signed a receipt note, headed "*Bath* Station, 7 August 1853," and which went on with these words, "To the Great Western Railway Company: Receive the undermentioned goods on the conditions stated on the other side. To be sent to *Torquay* station, and delivered to *R. C. Collins*, consignee, or his agent." The receipt note then contained the sender's declaration of the nature of the goods and their weight, and a classification of them. Then followed in a line, "Received the above-mentioned goods in good order and condition. *Wm. Spencer*, consignee." Then followed a tabular arrangement of the classification of the goods and of the company's charges. On the back of this note were 16 "Conditions," headed thus: "The Great Western Railway Company give public notice that they will not be answerable, &c." The 4th, 7th, 10th and 13th of these conditions are alone material. The 4th was: "They will not be answerable for the loss of, or damage to, any goods arising from fire," &c. &c. The 7th, 10th, and 13th conditions were:—

7. "That all goods addressed to places within the limits of the company's local regulations, for delivery of goods from the different stations on the railway, respecting which

all goods from the different stations on the railway, excepting which no directions to the contrary shall be received previous to arrival at the station, will be delivered to their destination by public carrier or other opportunity may offer; or they will, at the discretion of the company by whom they may have been received, be suffered to remain on the company's premises, to be stored in shed or warehouse, if there be convenience for doing the same pending communication with the consignor, at the risk of the owners, as referred to in clause 4; but that the charges of such carrier will be those of the company, and the delivery of the goods by the company will be considered as complete, and the responsibility of the company will be considered to end when such carriers shall have received the goods for further conveyance. And the company hereby declare, that any money which may be received by payments for the conveyance of goods by other carriers beyond their said limits will be so received only to the convenience of the consignors, for the purpose of enabling them to pay to such other carriers, and will not be received or made by the company upon the goods in the hands of carriers beyond the extent of their own railway. And the company hereby further give notice, that they will not be responsible for any loss, damage, or detention of goods.

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entrusted to them, they will only agree to carry them subject to the above conditions, and to all other the rules and regulations of the said company."

It was proved that it was the custom of the Defendant to receive traffic, as the next carriers, from the Great Western Railway Company, and to forward it on, receiving for doing so a mileage proportion for the carriage of the same.

On the goods arriving at *Bristol*, which is the terminus of the Great Western Railway line, they were handed over to the Defendants' company, whose line begins at *Bristol* and ends at *Exeter*, where it is joined by the line of another company, the *South Devon* Railway, which runs on to *Torquay*. The goods were carried on the same train as before, and were under the care of the same guard, being in the service of the Great Western Railway Company. They were placed for the night on a siding, in an open shed of the Defendants' company, where they were destroyed by fire.

The Defendants contended that the "Conditions" exempted them from liability; the Plaintiff insisted that the conditions applied only to the Great Western Railway Company; the learned Judge left to the jury the question of fact, whether the Defendants had been guilty of negligence, and the jury found that they had not. A verdict was then entered for the Plaintiff, with leave for the Defendants to move to enter a nonsuit. A rule having been obtained for this purpose, it was made absolute, on the ground that there was but one contract, which was with the Great Western Company, to carry the goods from *Bath* to *Torquay*, and that that company was, under the "conditions," expressly exempted from liability to loss by fire (a). The

(a) 11 Exc. Rep. 790.

judgment was reversed in the Exchequer Chamber (*b*).
The present appeal was then brought.

The rule for entering a nonsuit was in these terms:
“why a nonsuit should not be entered, or why the
damages should not be reduced, on the grounds that the
van and goods lost or damaged were received and carried
by the Defendants under a contract, by the conditions of
which the Defendants were not liable for loss or damage
by fire.”

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The case stated under the Common Law Procedure
Act of 1854, contained the following sentence:—It was
agreed at the trial that no objection should be taken to
the form of the contract, as set out in the declaration; but
that, if necessary, the Plaintiff should be at liberty to
amend his declaration, so as to meet the real facts of the case.

The Judges were summoned, and Mr. Justice *Wightman*,
Mr. Justice *Williams*, Mr. Baron *Martin*, Mr. Justice
Crompton, Mr. Justice *Willes*, Mr. Baron *Watson*, and
Mr. Justice *Byles* attended.

Mr. Serjeant *Kinglake* and Mr. *Collier*, for the
Appellants:

There is here but one contract; it is made between the
Great Western Company and the Plaintiff, and is to carry
from the *Bath* station, where the goods were received, to
the *Torquay* station, where they were to be delivered, subject
to certain conditions: *Muschamp v. The Lancaster and
Preston Railway Company* (*c*) distinctly established that
principle as one which was to govern these cases; and the
same principle was acted on in *Scothorn v. The South
Staffordshire Railway Company* (*d*); and was also ap-

(*b*) 1 Hurl. & Nor. 517.

(*d*) 8 Exc. Rep. 341.

(*c*) 8 Mee & W. 421.

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plied, though under different circumstances, in *Machu v. The London and South Western Railway Company* (e). The last case of this sort is that of *Wilby v. The West Cornwall Railway Company* (f); and the general law as to the entirety of a contract of this kind is plain. There is nothing here to raise an exception to its application. There was, consequently, no contract between the Plaintiff and the Defendants.

[The *Lord Chancellor* : Does the company use different receipt or ticketing notes when carrying goods within the limits of its own line alone ?]

It does not. The receipt of a mileage proportion by the Defendants does not affect the question; they acted as the agents of the Great Western Company to carry into effect the contract of that company, and received payment for so doing, but did not thereby become contractors with the Plaintiff.

The receipt of money for the whole distance must be coupled with the words in the 10th condition, and both together show that the Great Western Company, and no other, entered into the contract with the Plaintiff. All the words in the 10th condition which refer to anything beyond "the limits" of the company's railway relate only to the carriage of the goods, by waggons or otherwise, to parts of the town distant from the station where the railway journey ends. The 7th condition must be read with the 10th, and then there can be no doubt that such is the meaning of the words. To give them a different meaning would be to render two parts of the same contract inconsistent with each other, and make the condition not merely restrain but contradict the contract. If any such inconsistency exists (which is, however, denied) the words which

(e) 2 Exc. Rep. 415.

(f) 2 Hurl. & Nor. 703.

appear to occasion it must be rejected. *Fowles v. The Great Western Railway Company* (g) shows that the construction now contended for must be adopted. The fact, that the goods were still kept in the same truck, attended to by the same guard, is sufficient to show that, though upon another line of railway, they were still under the care and control of that company which had entered into a contract to convey them from *Bath*, and to deliver them at their final place of destination, *Torquay*. There is no contract whatever between the Plaintiff and the Defendants.

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Mr. *M. Smith* and Mr. *T. W. Saunders*, for the Respondent:

There are here three contracts. The first is that which was made by the Great Western Railway Company on its own behalf; the other two were made by that company acting as agent for the two companies. The first is subject to those special exemptions from the common law liability of a carrier, which are contained in the conditions; the others not subject to such exemptions, but are the contracts of carriers at common law. The words of the conditions show most clearly that the Great Western Company relieved itself from all liability "beyond the limits" of its own railway. The first part of the receipt note "to be sent to *Torquay* station" may, perhaps, bear the interpretation put on it by the other side, but the 10th condition is plain and unequivocal; and if any part of the note is to be rejected, it must be that part which would render the meaning equivocal, not that which is free from all doubt. The consignor may send the goods where he likes, but as to the Great Western Company, he sends them, subject to the conditions. And it should be remarked, that the general words at the top of the note are not "to carry," or

(g) 7 Exch. Rep. 699.

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“to convey,” but “to be *sent* to *Torquay* station,” which, of themselves, imply, that the Great Western Company only undertook to convey a certain distance, and then to send on the goods by some other railway. This is made more plain by the declaration, that the payment for the whole distance is received by the Great Western Company merely for “the convenience of the consignor for the purpose of being paid to other carriers.”

[Lord *Wensleydale* referred to the words in the case “handed over to the *Bristol* and *Exeter* Railway Company.”]

That meant transferring the goods to the care and control of another company. The receipt by the other companies of a regulated proportion of mileage for the carriage of goods on their lines shows that they receive a consideration in virtue of which each assumes, in turn, the character, and must bear the responsibilities, of a common carrier. The sending of the goods on the same truck and under the care of the same guard is not to be taken into consideration; it is done as a matter of convenience to each railway company to prevent trouble and loss of time in changing carriages and making out fresh way-bills. The contracts are not affected by anything particular in the mode of performing them.

But it is, besides, submitted that the question of the existence of a contract with these Appellants cannot now be discussed. The terms of the rule to enter a nonsuit assume the existence of a contract, and refer only to the question, whether an exemption from liability for loss by fire was included in it. It must now be taken that the action was properly brought, and the only question is as to exception from liability; the Defendants are not protected by the condition as to loss by fire.

Mr. Serjeant *Kinglake* replied :

There is nothing in the objection that the existence of the contract cannot now be disputed. The question is, whether a nonsuit is to be entered. If there is a contract with the Great Western Company to carry all the way to *Torquay*, there can be no contract with the *Bristol* and *Exeter* Company, and that is ground of nonsuit. The Exchequer Chamber declared that there was evidence of a contract with this latter company. That raised the whole question. If there was a contract, it was a special contract, and then the Plaintiff must be nonsuited ; for the declaration is not on a special contract, but on common law liability as a carrier. It was in order to get rid of the embarrassment of discussing this question that the Defendants had consented to allow an amendment of the declaration.

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The *Lord Chancellor* (Lord *Chelmsford*) put the following question to the Judges : Assuming that the goods referred to in the sending note, page 11 of the printed case, were accidentally destroyed by fire after they had passed *Bristol*, and while they were on the *Bristol* and *Exeter* Railway, were the Defendants liable for the loss occasioned by the fire ?

Mr. Justice *Byles* :

My Lords, I am of opinion that the Plaintiff below is entitled to recover against the Defendants below, the *Bristol* and *Exeter* Railway Company.

11 June.
—
Mr. Justice
BYLES.

It is true that there was but one signed document between the Plaintiff below, the consignor, and the Great Western Railway Company ; but that document comprehends two contracts ; the first between the consignor and the Great Western Railway Company in their capacity of common carriers, to carry the goods from *Bath* to *Bristol* ;

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the second, between the consignor and the Great Western Railway Company, as agents of the consignor, to forward the same goods by the *Bristol* and *Exeter* Railway for the consignor. As soon as the Great Western Railway Company have fulfilled their duty as common carriers under the first contract, and transferred the goods to the Defendants under the second contract, and the Defendants have accepted them to be carried for the original consignor on their own railway, a third contract arises, that is to say, a contract between the Plaintiff, the consignor, on the one part, and the Defendants below, the *Bristol* and *Exeter* Railway Company, on the other. The liability of the Defendants below to the consignor under that third contract is limited by no conditions that appear in evidence, and the accident being of a description for which common carriers are by law responsible, I think the Defendants below liable.

That there were two contracts between the consignor and the Great Western Railway Company, one in their character of common carriers, and the other in their character of forwarding agents, appears from the 10th condition; for a portion of the money which was paid by the consignor at *Bath* was paid for the conveyance beyond *Bristol*, which is the limit of the Great Western Railway; and the 10th condition provides that money paid for that purpose will be received by the Great Western Railway Company for the convenience of the consignors, and for the purpose of being handed over to the farther carriers, and will not be received by the Great Western Railway Company in their capacity of common carriers.

The cases of *Muschamp v. The Lancaster and Preston Railway Company* (*h*), and *Scothorn v. South Staffordshire Railway Company* (*i*) have no bearing on the true

(*h*) 8 Mee & Wels. 421.

(*i*) 8 Exc. Rep. 341.

questions in this case. Those cases show that if a parcel is received by a railway company, without any protecting conditions, to be delivered by them at a place on another line, the receiving company are, as between themselves and the consignor, *prima facie* common carriers for him throughout the whole distance. In *Muschamp v. The Lancaster and Preston Railway Company*, Mr. Baron Rolfe expressly says that he only held at the trial "that *prima facie* there was an undertaking to carry to a farther place." Those expressions, so far as they assume that the responsibility of the receiving company may be varied by conditions, are in favour of the Defendants in Error; but they show that these cases of *Muschamp* and of *Scothorn* do not touch the true questions of the case now under consideration, which involve merely the interpretation of the conditions, and their applicability to the Defendants' contract.

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Mr. Baron Watson :

In answer to the question proposed to the Judges by your Lordships, I am of opinion that, assuming that the goods referred to in the receipt note were accidentally destroyed by fire after they had passed *Bristol*, and while they were on the *Bristol* and *Exeter* Railway, the Defendants are not liable for the loss occasioned by fire.

Mr Baron
WATSON.

The question with reference to the carriage of the goods is, Did the Appellants enter into any, and, if any, what contract? I think that there never was any contract for the carriage of the goods with the Appellants. In my opinion there was a contract with the Great Western Railway Company.

All this turns on the receipt note, and the 10th condition indorsed thereon. The following are the terms of the note:—[His Lordship read them.]

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The true mode of ascertaining the meaning and effect of the note and condition is by considering the case as if the action had been brought against the Great Western Railway Company for a loss or injury to these goods (other than by fire) whilst in the journey between *Bristol* and *Exeter*. In that case would the Great Western Railway Company have been liable? I think it would. The receipt note expressly says, "The under-mentioned goods are received to be sent to *Torquay* station, and delivered to *R. C. Collins*, or his agent." One sum of 9*l.* 13*s.* 5*d.* is paid for the whole journey, expressed as the company's charges. Here there is one journey, from *Bath* to *Torquay*, and one charge. There have been various cases on this subject, the first of which was *Muschamp v. The Lancashire Railway Company* (*j*), where Mr. Baron Rolfe left it to the jury as a matter of fact, whether, under the circumstances, where goods were carried over a continuous line of railway of several companies, there was a separate contract with each railway, or one contract with the first railway who received the goods; and it was found by the jury, and upheld by the Court, to be one contract with the company who received the goods. This decision has been followed by several reported cases. *Scothorn v. The South Staffordshire Railway Company* (*k*), *Wilby v. The West Cornwall Railway Company* (*l*). This mode of dealing with contracts with one company for conveyance of goods over several continuous lines of railway is founded on reason, good sense, and convenience. A contrary decision would be fraught with the greatest possible inconvenience to railway companies and to the public.

There is no novelty in these decisions, as was supposed

(*j*) 8 Mee. & Wels. 421.

(*l*) 2 Hurl. & Nor. 703.

(*k*) 8 Exc. Rep. 341.

at your Lordships' bar ; for it often happened that where different proprietors of waggons and stage coaches over different parts of one continuous journey carried in connexion with each other with a community of profit, and not of loss, the proprietors at the commencement receiving the price for the whole distance were always considered as the contracting parties ; and it never was doubted that the coach or waggon proprietors originally receiving were the contracting parties, and the above-mentioned decisions have been acted upon every day at *Nisi Prius* since the decision of *Muschamp v. The Lancaster Railway Company*.

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The fact is, that railway companies stand in two distinct relations to the public:—1st. As proprietors of a railway over which other railways in continuation and joining have a right to run trains or trucks on paying certain specified tolls ; 2dly. As common carriers, and as such they may and do carry, not only over their own railway but over continuous lines, and that either by running trains or trucks over such other railway, or by a standing agreement between the two companies. This ought to be kept distinctly in view.

It was argued at the bar that the 10th condition on the receipt note controlled the effect of that note, and confined the responsibility of the Great Western Railway Company only to the limits of their own railway, and that the 10th condition was introduced for the purpose of obviating the effect of the decisions above referred to. It appears to me that that was not so ; but that it was for the purpose of regulating the general conveyance of goods from place to place. If the exception by fire had not been introduced the present question never would have been heard of. The 10th condition does not, as it appears to me, confine the liability to the extent of the Great Western Railway, but it was for a different object. It has reference to “goods

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addressed to consignees resident beyond the limits of the company's local regulations for delivery of goods from the different stations on the railway, and respecting which no directions to the contrary shall have been received previous to arrival at the station," and I think the parts of this condition as to payment and responsibility for loss are confined to cases of consignees residing beyond the limits of the company's regulations for delivery. It is obvious that this clause relates to *delivery*, and not to *carriage*, and with respect to places where the consignee is resident at such a distance from the railway at which they do not undertake to deliver. Is it to be supposed that at *Bristol*, or at *Exeter*, the railway company is at liberty to warehouse the goods till they hear from the consignee?

This appears, in construing the 10th condition in conjunction with the 7th condition, which precedes, "That all goods addressed to places within the limits of the company's local regulations for delivery of goods from the different stations on the railway respecting which no directions shall be given will be delivered by the company at these places." This clause is confined (as the 10th) to places beyond the local regulations for delivery; but it refers to the *delivery* merely. The limits, I conceive, according to the true construction of these conditions, are the limits which the Great Western Railway professes to carry over, not merely to Great Western Railway. The servants all along the line are, for this purpose, the company's servants. See *Machu v. London and South Western Railway Company* (m).

For these reasons I think the contract is with the Great Western Railway Company, and not with the *Bristol and*

Exeter Railway Company, and that consequently, as there is in their conditions an exception of loss by fire, the appellants are not liable.

But supposing this is not the true construction of the contract, the difficulty then begins. When, where, and by whom was any contract made with the *Bristol* and *Exeter* Railway Company? It is clear that there is no express contract shown to have been come to between the parties. There is no evidence that they were cognizant of this receipt note. The only evidence stated in the case is, that "the truck of the Great Western Railway Company (accompanied by one of their guards) was put on the *Bristol* and *Exeter* Railway," and ran from *Bristol* to *Exeter*. How can a contract be inferred from that circumstance? It is more probable, I should infer, that the truck was put on under the general right of the public to make use of the railway, or under a general contract existing between the two railways, whereby one became sub-contractor to the other. How can a contract be presumed, unless it is supposed that the Great Western Railway Company had authority to make contracts for the *Bristol* and *Exeter* Railway Company and for the Defendant in Error? If so, what was that authority? The statement in the case, that goods are handed from one railway to another, does not raise any such presumption. If a contract was to be inferred, what is the contract? It is conceded that on the journey to *Bristol* loss by fire is excepted. There are several conditions in this note. Do all those conditions apply, or if not, which of them are to be imported into this contract for the carriage beyond the limits of the Great Western Railway? It is strange, when goods are taken to the limits of the railway, that at every part of the railway there are different conditions and exceptions. Thus suppose the goods had been sent from *Torquay* to *Bath*

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without any exception from fire, and that the *South Devon* Railway Company took on themselves the ordinary liability of a common carrier to the limits only of their own railway, but that there were different terms on the next railways, the owner might have terms imposed on him which he never contemplated when he delivered the goods. From this one would infer, if the first railway was agent for the other, that the goods were to be carried all through on the same stipulations as those in the note originally given.

I am therefore of opinion that the Great Western Railway Company was the contracting party, and that if not, there is no evidence that the Appellants ever entered into any contract with the Defendant in Error. If the contract with the Great Western Railway Company is binding on the *Bristol* and *Exeter* Railway Company, then there is an exception from loss by fire. And, consequently, I answer your Lordship's question in the negative.

Mr. Justice *Crompton*:

Mr. Justice
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My Lords, this case appears to me to depend upon the construction which is to be put upon the contract of carriage signed by the Plaintiff below when he delivered the goods in question to the Great Western Railway Company. If, as contended by the Defendants below, the Great Western Railway Company were bound by the contract under which they received the goods to carry them to *Torquay* by themselves or their agents, by their own and the Defendants' railway, subject, amongst other things, to the exemption from the carrier's usual responsibility as to fire, the Defendants would not be liable for the loss by fire. If, on the other hand, the contract between the Plaintiff and the Great Western Railway Company was, that the latter should act as carriers, and convey these goods only as far as the extent of their own line, and should then hand

them over to the next carriers, then, the *Bristol and Exeter Railway Company*, having received such goods, would be liable as common carriers, not having restricted their common law liability. In such case the Great Western Railway Company would be the agent of the Plaintiff to forward the goods, and would be bound to forward them on the terms on which the *Bristol and Exeter Railway Company* carried. These terms, in the absence of proof of any special condition or restriction, are the terms which the common law imposes on carriers. The case would then be the ordinary one, of an agent delivering goods to a carrier, where the principal to whom the goods belong has generally a right of action in case of loss by the carrier. Thus, where goods are ordered from a distant place, and the vendor sends them by a carrier, the vendee, in whom the property vests, may bring the action, although he knows nothing of the carrier, and the carrier knows nothing of him. In such case the vendor is the agent of the vendee in sending the goods. Here the Great Western Railway Company, forwarding the goods according to their engagement, would be the agents of the Plaintiff in so doing; and the Defendants might have restricted their liability by imposing special terms, which would have bound the Plaintiff.

In the Court below I expressed my opinion at some length on the construction of the contract in question, and I do not see any sufficient reason to change the opinion I then formed.

It may be remarked, that since the great improvements which have taken place in modern times in the transmission of goods along a line, where there may be two or three or more distinct carriers or carrying companies, the contracts which have been made by the carrier who first receives the goods have been of three descriptions. The first is, where

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the carrier receives the goods to carry from *A.* to *B.*, and where having so received the goods to be so carried he is bound to carry them by himself or his agents. If he contracts with another company to carry them beyond the place where his own means of carriage extend, he is answerable as a common carrier, just as much as if he had carried them in his own carts or vans, in his own ship, or on his own railway; it is nothing to the parties sending the goods in what way he performs his undertaking for the care and carriage of the goods. This is the common case where goods, parcels, or passengers are booked at a railway station as from *A.* to *B.* When the facts are ascertained, there is no difficulty as to the law; and nothing could be farther, I believe, from the minds of any of the Judges who decided the present case in the Exchequer Chamber than to entertain any doubt of the principle upon which *Muschamp v. The Lancaster and Preston Railway Company*, and other cases of that description, were decided, and which is acted upon by judges and juries without any doubt at almost every sittings and assizes.

Companies not liking such liabilities for loss and accidents, where they have no control beyond their own line of railway or their own carriage, frequently adopt a different mode of contracting, and absolutely refuse to book beyond their own line. In such second case there may be considerable inconvenience to the public. It may be a great annoyance for passengers to re-book on entering on a new line; and the owner of goods might find it almost impossible, or expensive, to meet his goods, or send to meet them, for the purpose of transferring them from one line to another, or from a line of canal or railway to vans, boats, or carriages of other carriers.

The carrier receiving the goods may, therefore, for the convenience of the public or his customers, adopt a third

species of contract. He may say, "We do not choose to undertake responsibilities for negligence and accidents beyond our limits of carriage, where we have no means of preventing such negligence or accident; and we will not, therefore, undertake the carriage of your goods from *A.* to *B.*; but we will be carriers as far as our line extends, or our vehicles go, and we will be carriers no farther; but to protect you against the inconveniences and trouble to which you might be exposed if we only undertook to carry to the end of our line of carriage, we will undertake to forward the goods by the next carriers, and on so doing our liability shall cease, and our character of carriers shall be at an end; and for the purpose of so forwarding and of saving the trouble of two payments, we will take the whole fare, or you may pay as one charge at the end; but if we receive it we will receive it only as your agents for the purpose of ultimately paying the next carriers."

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Contracts of a somewhat similar nature were made when consignments of large quantities of gold began to be made from *California* to this country. The gold was delivered in *California* to a ship which carried it to the port in the *Pacific*, from which it was carried across the *Isthmus* to the port in the *Atlantic*, and then brought to a port here; and on the bill of lading was a stipulation, that the companies receiving should only be responsible for loss or damage as far as they carried, but that the consignor must look to the other company for loss whilst in their care.

This course, whilst it protects the receiving carrier from responsibilities which it would be hard upon him to bear, and which, as he is not a carrier on the farther line or road, there is no obligation on him to undertake, is, especially in the case of lines of railway, more convenient for the customer than the mode according to which he would have to pay on more than one occasion, and would have to

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provide some person to see to the transferring of the goods. It is forbidden by no law; and if the parties agree to it there is no ground for complaint. It must be remembered that the carrier in these cases is not bound to undertake to carry goods beyond his own line, and there is no law to compel him to undertake any farther duty with respect to the goods, and it must depend entirely on the contract whether he undertakes any duty after the goods have arrived at the place beyond which he does not carry. He may, by contract, to be implied from his conduct, or by express contract, agree to perform a farther duty; and it is by such contract only that he can be liable either as a carrier beyond his own line, or as an agent to forward along another.

It appears to me, that the contract in the present case was of the third description to which I have referred. The Great Western Railway Company, being under no obligation, in point of law, to receive goods to be carried beyond their own line, say to the Plaintiff, we will carry only on the terms set forth in the receipt note; and to those terms the Plaintiff agrees.

The conditions commence by stating, that the Great Western Railway Company will not be accountable, except under certain conditions, and when they speak of carrying and conveying goods, they speak of carrying and conveying on *their* railway. The latter part of the 10th clause seems to me to point out, as distinctly as words can express, what are the liabilities which the company will take upon themselves.

Attention was called to the 7th section, which refers to the delivery of goods within the local limits from their own stations, within which they choose to undertake the delivery of goods sent to such stations; and it was argued, that the 10th section is only applicable to cases where the

Goods are sent to some place from one of their stations. And it being assumed that they agree to carry to *Torquay* (which is the whole question), it is said that the present is not a case of carrying beyond the limits of their own stations within the meaning of the 10th condition.

It seems to me, that as it is found that *Bristol* was their last station, the sending them on by the next carriers (as the Defendants are found to have been) was a sending beyond their limits; but the latter words of the condition seem to leave no doubt of their intention not to be responsible as carriers beyond their own line. There might possibly have been a doubt raised whether they had been explicit enough in the earlier part, but they proceed to say expressly (beginning a new sentence), "And the company hereby give notice that any money which may be received by them as payments for the conveyance of goods by other carriers beyond their said limits will be so received by them for the convenience of the consignors, for the purpose of being paid to such other carriers, and will not be received as a charge made by the company upon the goods *in the capacity of carriers beyond the extent of their own railway*;" that is to say, as it might be supposed that making one charge, or taking one payment for the whole, may place us in the situation of being carriers the whole way, or may be evidence on which a judge and jury might probably act of our being so, we tell you that we will not undertake that farther duty, that we receive the money, if paid beforehand, not as carriers, but as your agents, receiving money to be paid to the other carriers, and that you shall not so make us out to be carriers beyond the limits of *our own railway*. And they proceed to give "notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur

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beyond their said limits." Words can hardly be more explicit. The goods are sent by carriers beyond the limits of their last station. If the goods could only have reached their place of ultimate destination by canal or waggon, it could hardly, I think, be doubted that this clause applies to the case of the company handing over the goods to the canal or road carrier. Suppose, for instance, that the goods had been consigned to some place fifty miles from *Bristol* where railways did not extend. It may seem more natural that where one line of railway runs into another it should be one course of carriage; but the Defendants were, and are found to be, the next carriers; and even if there could have been otherwise any doubt, the company, by the expression of "*their own railway*," seem directly to point at delivering to other railway companies than their own, as within the provisions of the 10th condition.

Great reliance was placed on the fact that goods are to be sent to *Torquay* station. And I think that if *Torquay* had not happened to be on the line of another *railway*, but had been accessible only by canal or waggon, the present mode of getting out of the clause would hardly have occurred to any one. If, for instance, the goods had been directed to *Bodmin*, before the railway extended to that place, and the word "*Bodmin*" had been inserted in the sending note, the main arguments for the Defendants would not have arisen. But can the fact of the place being a station on another railway outweigh the very clear and distinct words by which the company declare that they will not be carriers beyond their own railway?

The argument of the Defendants is, in effect, that "As we mention *Torquay* station, it is, against the fact, to be taken conclusively that all the line between *Bath* and *Torquay* is part of the Great Western Railway, and that every station between those places is a station on the Great

Western Railway. What then becomes of the expression "*our own railway*," or of the distinct intimation that they will not receive goods except on the terms of not being carriers beyond the extent of *their own railway*, and beyond the local limits for delivering from their stations?

For these, and the reasons stated in the judgment in the Court of Exchequer Chamber, I am of opinion that the Great Western Railway Company were, by the receipt note, not to be in the capacity of carriers beyond their own line, but that they were to hand over the goods to the next carriers, found to be the Defendants.

In what situation then was the Plaintiff? He finds that his goods are lost, and wishes to bring an action. He is stated in the fifth plea to have been himself a carrier, and to have been carrying goods for other persons. And if that were the fact, he may have known from the course of his business, or he may otherwise have known, of the facts which were proved at the trial, as to the extent of the lines and the practice as to the Defendants receiving the goods as the next carriers. Could he possibly have brought an action against the Great Western Railway Company without being nonsuited on the ground of their express limitation of their liability from loss or damage beyond their own line? They would have said, whatever the negligence may have been, and however the fire was occasioned, and whether any exemption was applicable or not, we, by our 10th condition, expressly informed you that we would only be answerable for loss or damage on our own line, where we had the power of control, and of making regulations to avoid such accidents, and where, perhaps, we had covered ourselves by insurance. We have performed our duty to you by putting your goods in the proper course of transit, by delivering them to the next carriers, and surely we had your authority so to do.

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The case of the Plaintiff then is this: I sent my goods by the Great Western Railway Company as far as their line went, and they were to forward them. They forwarded them, by my authority, under the contract in the sending note; and, if necessary, I adopt what they did in so forwarding the goods. The goods were delivered to the Defendants to be carried forwards, and whilst on their line they were destroyed. Surely the facts as stated are sufficient evidence to show a delivery to the Defendants as common carriers. It seems to me that they are liable as such to the Plaintiff as owner of the goods, on the very simplest and most elementary doctrine of the law as to common carriers, by which the action may be brought by the owner of the property for whom the contract is made.

At all events the contract, and the handing over the Great Western goods, and the carrying them forward by the Defendants on the Defendants' railway, was evidence for the jury of the Defendants having received these goods to be carried for the Great Western by the Defendants as common carriers. And though your Lordships ask us in terms whether the Defendants are liable, I presume that we are to understand that question as meaning, whether there was evidence for the jury, for you will observe that the only leave reserved was to enter a nonsuit; and it is only in the case of there being no evidence to go to the jury that either of the courts below had any power to interfere with the finding of the jury as to the fact, who must on this record and case be taken to have found for the Plaintiff, subject to the leave to enter a nonsuit, if there was *no evidence to go to them*. I need hardly remind your Lordships, that neither the courts below, nor your Lordships have anything to do with the case as a question of fact on a balance of evidence, which cannot be raised upon such a rule. If the Defendants had wished any

fact as to this part of the case to go to the jury, they would have desired it to be left to them. And there can be little doubt which way they would and ought to have found it.

The remaining point is, whether any exemption as to fire can apply. The Plaintiff's answer to the claim of any such exemption appears to me conclusive. He says, the exemption in the sending note can only apply to loss on the Great Western Railway. That company state, that their responsibility is limited to their line; and then they restrict such liability, that is, the liability on their line, by excepting loss by fire. The Plaintiff says, if there was any special exemption on your (the *Bristol and Exeter*) line, and you had, either by dealings between you and me, or between you and my agents for this purpose, the Great Western Railway Company, or by distinct notice to me or them, made any exemption from loss by fire, so as to limit your common law responsibility as to loss by fire, I should have been bound by such stipulation; but there is no such proof. No evidence was given that you had any such condition of exemption, or that you expressly or impliedly had given any notice of it, either to me, or to the Great Western Railway Company, or to the public. And, in the absence of such proof, your responsibility as common carriers with respect to goods delivered to you to be carried by you as common carriers attaches.

One other argument remains to be noticed. It was suggested, or rather hinted at, that the Great Western Railway Company, in forwarding the goods by the Defendants, must be taken to have forwarded them on the same terms on which they themselves had contracted to carry. But this seems to me to be wholly untenable. The Great Western Railway Company limit their responsibility to their own line; and this is an exemption from such

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responsibility, and why should it apply to another line where the conditions might be quite different, or where there may be none at all? We must take it here, in the absence of proof of such exemption or conditions applicable to their line (which proof clearly lay on the Defendants) that no such conditions existed. And if so, the Great Western Railway Company, as forwarding agents, could have had no authority, nor can they be presumed, in point of fact, to have forwarded the goods in any other than the usual mode and upon the usual terms on which the Defendants carried. If they had carried on less stringent terms than the Great Western Railway Company, the latter would not have been performing their duty as forwarding agents if they had forwarded them on terms less favourable than the usual ones; and if there had been anything on this point it could only have arisen as a matter of fact for the consideration of the jury.

Upon the whole, therefore, I am of opinion that the Great Western Railway Company did not contract to carry or to be responsible beyond the extent of their own line, and that they properly forwarded the goods by the Defendants' line; that the plaintiff had a right to treat his goods so forwarded as delivered to the Defendants as common carriers, to be carried forward by them as such and that there was no proof of any exemption from or restriction of the ordinary responsibility which the law throws upon common carriers applicable to the loss which happened to the goods whilst on the line of the Defendants and in their custody as common carriers. And I therefore answer your Lordships' question in the affirmative.

Mr. Baron *Martin*:

Mr. Baron
MARTIN.

My answer to the question proposed by your Lordship is, that the Defendants are not liable for the loss occasioned by the fire.

To entitle the Plaintiff to recover he must establish two propositions : First, that the evidence stated in the special case proves a contract with the Great Western Railway Company to convey, as carriers, a van load of goods from *Bath* to *Bristol*, and then to become forwarding agents, with authority from the Plaintiff to make a contract on his behalf with the Defendants, the *Bristol* and *Exeter* Railway Company, to convey the van to *Exeter* on its transit towards *Torquay*; and, secondly, that they in fact did make such contract.

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The words, “ handed to the Defendants ” are figurative. The van and goods were upwards of five tons weight; but it is clear that what is meant is, that the truck upon which the goods were placed was joined to a train of the Defendants’ going to *Exeter*, and drawn by a locomotive engine under the charge of their servants. But there is no evidence that any contract was made, or any entry inserted in any way-bill or book. And the next paragraph states that the van was conveyed by the Defendants to *Exeter* in the same truck in which it came from *Bath*, and was attended by a guard in the service of the Great Western Railway Company. It is also stated that it was the custom of the Defendants to receive traffic as the next carriers from the Great Western Railway Company, and that they received for so doing a mileage proportion for the carriage. This, I presume, means that the Defendants were to receive such share of the sum of 9 l. 13 s. 5 d., the charge for carriage from *Bath* to *Torquay*, as was in proportion to the number of miles on their line traversed by the van. Whilst on the line of the Defendants’ railway the goods were accidentally burnt, without any fault or negligence on their part.

The line from *Exeter* to *Torquay* is a third line, belonging to a company called the *South Devon* Railway Company.

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If the Plaintiff had sued the Great Western Railway Company, they would have been protected by a clause in their conditions against loss by fire; and the object of the Plaintiff in suing the Defendants is to impose upon them a contract as carriers at common law, in which case they would only be excused from loss occasioned by the act of God and by the Queen's enemies; which does not include loss by ordinary fire. The question mainly, but not entirely, depends upon the sending note; and in my opinion it, with the facts before stated, proves, not the contract which the Plaintiff is bound to establish, but a different one, viz., a contract by the Great Western Railway Company to carry the van load of goods from *Bath* to *Torquay*, similar to the contract in *Muschamp v. The Lancaster and Preston Railway Company* (n), and other cases. The sending note is principally in print; the blanks are filled up with the particulars of each transaction.—[His Lordship read it].

Now it seems to me, that if the consignor was not acquainted with the fact that the Great Western Railway ended at *Bristol*, what I have already stated of this sending note would indicate that the Great Western Railway Company contracted, as carriers, to carry the goods from *Bath* to *Torquay*. And if the consignor was acquainted with that fact, and that there were two other lines of railway between *Bristol* and *Torquay*, belonging to and worked by independent companies, it would indicate that the three companies had an arrangement amongst themselves for the goods traffic on their respective lines, and that the Great Western Railway Company received goods at *Bath*, to be conveyed to *Torquay* upon an agreed tariff of charge, at so much per ton for the whole journey.

(n) 8 Mee. & Wells, 421.

and Preston Railway Company, upon which that Court mainly relied, differed from the case before your Lordships in this respect, that there were no conditions in the contract, but it was created merely by the receipt of a parcel by the railway company, to be delivered at a place on another line. Is there anything, then, in the special terms of this contract which excludes the application and authority of that case? It was contended, in the course of the argument, that if the 10th condition is inconsistent with the contract on the face of the note, it must be rejected. As, however, the goods were received expressly "on the conditions stated on the other side," I do not think that any one of the conditions can be dispensed with; nor, if the 10th condition bears the meaning given to it by the Plaintiff, would it be at all necessary to deprive it of its effect. A contract to convey goods from *A.* to *B.*, with a condition that, for a certain part of the journey, the company will not be responsible, will be no more inconsistent with the absolute contract for the whole journey, than where a carrier undertakes to convey goods, with a condition that for certain descriptions of goods he will not be liable at all.

The question turns upon the true meaning of the 10th condition. It is said that this condition expressly exonerates the Great Western Railway Company from liability beyond the limits of that company's own railway; but I cannot understand this to have been its object, or to be its effect. It appears to me rather to contain provisions for the *delivery*, than, strictly speaking, for the *carriage* of goods. The 7th condition states the mode in which the company will deliver goods from the different stations on the railway, addressed to places within the limits of the local regulations for delivery. The 10th condition then proceeds to deal with the subject of goods addressed to consignees resident

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Railway Company, they would have acted upon this condition; but they do nothing of the kind. They make but one charge for the entire journey, which is to be paid by the Plaintiff in one sum at the end of the journey at *Torquay*, and which is stated in express terms to be *the charge of the Great Western Railway Company*. This is not acting upon the 10th condition.

Lawyers who have been in the habit of advising carriers know well how the account would be made out if the mode of dealing contemplated by the 10th condition had been acted upon. The charge for the carriage was payable at *Torquay*, and not elsewhere; and in the bill of charge, instead of one sum of 9*l.* 13*s.* 5*d.*, the first item would have been, "paid so much to the Great Western Railway Company for the carriage from *Bath* to *Bristol*." This sum would have been paid to them by the *Bristol* and *Exeter* Railway Company; or, if an account was kept between them, it would have been credited in account. The second item would have been, "paid to the *Bristol* and *Exeter* Railway Company, for their carriage from *Bristol* to *Exeter*;" that would have been paid or credited in account by the *South Devon* Railway Company in the same manner. The third item would have been the charge for carriage from *Exeter* to *Torquay* due to the *South Devon* Railway Company. Persons in the habit of receiving parcels by carriers must have seen numberless bills so made out. This was the regular course of business when carriers acted upon the principle of the 10th condition, before traffic arrangements were made between railway companies. But since then the charges have all been included in one sum.

Again, the first part of the condition states, that in cases within it "the goods will be forwarded to their destination by public carriers, or otherwise, as opportunity may offer." Looking at the evidence in this case, would the

Great Western Railway Company have performed their contract if they had stopped the Plaintiff's goods at *Bristol*, and forwarded them to *Torquay* by any other conveyance than the two railways? I apprehend clearly not, and in my opinion, therefore, the evidence shows that the Great Western Railway Company did not in the transaction act upon the 10th condition at all.

The second part of the condition relates to cases where the carriage is paid beforehand. It does not include the present case, but when examined it will be found in substance to be the same as the first.

The latter part, that the Company will not be responsible for loss or damage beyond their own limits, may or may not be legal. It is not necessary here to give any opinion upon it. But there is a piece of evidence in the cause which seems to me almost decisive. The argument for the Plaintiff is that by the contract with the Great Western Railway Company their responsibility ceased, and was intended to cease at *Bristol*. If it was so understood, for what possible reason was the guard in their service sent on to *Exeter* to attend to the goods?

Again, there is another test, which to my mind is conclusive. If the Plaintiff be right, there was a contract between him and the Defendants for the carriage of his goods from *Bristol* to *Exeter*. If so, upon the completion of the journey to *Exeter* he would have been indebted to them for the carriage from *Bristol* to *Exeter*, and liable to an action at their suit for it, if not paid. But I apprehend it is quite clear that he would not. He never made a contract or authorised any one to make a contract for him, that he was to pay anything upon the arrival of his goods at *Exeter*. On the contrary, he contracted to pay one entire sum upon their delivery to him or to his order at *Torquay*, and until the goods arrived there he was not

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liable to pay anything. Those who contend for the liability of the Defendants in this action must establish that, upon the evidence, if the goods had been delivered by the Defendants at *Exeter* to the *South Devon* Railway Company, the Plaintiff would have been liable to pay the Defendants the charge for carriage from *Bristol* to *Exeter*. In my opinion the evidence negatives any such liability.

I therefore think there was no authority given by the Plaintiff to the Great Western Railway Company to make a separate contract on his behalf with the Defendants for the conveyance of his goods upon their line. If the goods had been delivered at *Torquay*, he would have been liable to *one* action, *not three* actions, if he neglected to pay the agreed charge of the carriage.

Suppose the goods to have been lost beyond *Bristol* by a misfortune for which the Great Western Railway Company were not excused by their conditions, and the Plaintiff had sued them, and they had set up the 10th condition in answer to the action, the Plaintiff would have replied (and it seems to me unanswerably), that they never contracted with him upon the footing of the 10th condition; on the contrary, that they contracted with him for one entire sum to carry the goods from *Bath* to *Torquay*, and that he had nothing to do with any other person or Company.

In my opinion, therefore, there was no privity between the Plaintiff and the Defendants; the privity was between him and the Great Western Railway Company alone. There was a privity between the companies upon their contract as regards themselves, to apportion the amount charged, 9*l.* 13*s.* 5*d.*, but with this the Plaintiff had nothing to do.

This case is possibly of no great importance of itself, but the principle involved in it is of a most serious character; for if the Plaintiff succeed, persons sending goods by

railway beyond *Bristol*, and to most parts of *England* north of *York*, and the southern parts of *Lancashire*, and to *Ireland* and *Scotland*, will practically, I believe, in most instances be unable to obtain redress for the loss of or damage to their goods. In all these cases more than one line of railway, and in many several lines, are used for conveyance to the place of destination. The different companies to which those lines belong, either already have or assuredly will endorse upon their sending notes a condition the same as the 10th condition here, and the consequence will be that the railway company upon whose line the loss occurs would alone be liable. Before any action, therefore, can be safely brought, it must be ascertained where the loss or damage occurred. The owner of goods will be in a state of invincible ignorance upon this point, and all parties capable of giving him information will be interested to withhold it or to mislead. I therefore think that any mode of doing business on conditions which conduce to such a state of things, ought to be expressed in terms as to which no person dealing with a railway company as a common carrier could fall into any misapprehension or mistake.

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I desire to add, that I give my opinion upon the question proposed by your Lordships, viz., whether upon the fact stated in the case the Defendants are liable for the loss of the goods by the fire, and not on the question whether upon the evidence given at the trial there was a case to go to the jury. In truth the learned Judge who tried the cause left three questions to the jury, and he directed a verdict for the Plaintiff, giving the Defendants leave to move, as I understand, upon the facts as proved and found.

Mr. Justice *Williams*:

I understand the question asked by your Lordships to be, in effect, whether there was any evidence to go to the

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jury that the Defendants were liable for the loss occasioned by fire, as there described; because, at the trial before me, the leave reserved was to move to enter a non-suit if there was no evidence to go to the jury in support of the Plaintiff's case.

So understanding the question put by your Lordships, I have to answer it in the affirmative.

The 10th condition of the receipt note from the Great Western Railway Company appears to me to be worded for the express purpose of preventing the Great Western Railway Company from being in the relation of carriers on any line of railway ulterior to their own. As to the goods sent by them on any such line, they are not to be carriers, or to incur the liabilities of carriers; and as to any money they receive beyond their own charge, they are to receive it only for the purpose of being paid to the other carrier, and not as a charge made by themselves as carriers beyond the extent of their own railway.

This condition appears to me to preclude the Plaintiff from suing the Great Western Railway Company in respect of any loss occurring off their line, or for any default of any other carrier. And the case finds that the Defendants were the next carriers. I think, then, there is evidence that the Great Western Railway Company, acting as agents for the Plaintiff, employed the Defendants as carriers. If they did so employ them, the Plaintiff may adopt the contract which was so made on his behalf. And as we have no proof that by the terms of it the Defendants were to be excused from the ordinary liability of carriers, as insurers, for loss by fire, I am of opinion that there was evidence to go to the jury of their liability.

Mr. Justice *Wightman* :

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My Lords, the answer which I propose to give to your Lordships' question in this case is, that in my opinion the

Appellants were, upon the facts stated in the case, liable for the loss occasioned by the fire.

The Great Western Railway Company received the goods to be sent to *Torquay*, and delivered to the consignee. By the terms of the receipt note and conditions the Great Western Railway Company undertake, that in cases where the goods are consigned to places beyond their line, they will forward them by some public carrier, or otherwise, as opportunity may offer; and that the delivery of the goods by the Great Western Railway Company will be considered as complete; and the responsibility of the Great Western Railway Company will be considered to have ceased when such carriers shall have received the goods for further conveyance; and the Great Western Railway Company farther gave notice to the Plaintiff upon the receipt note, that any money which might be received by them as payments for conveyance by other carriers beyond their limits would be received only for the convenience of the consignees, for the purpose of being paid to such other carriers.

Such being the terms upon which the Great Western Railway Company received the Plaintiff's goods, and they having delivered them over to the Appellants at *Bristol*, where their line ended, to be carried by the latter towards *Torquay*, I take it to be clear that the responsibility of the Great Western Railway Company ceased upon such delivery over by them to the Appellants. And the question then is, whether the Appellants are liable as common carriers for hire to the Plaintiff for the loss which happened during the time that the goods were carried by them on their line from *Bristol* towards *Torquay*. The van, with the goods, was handed over to the Appellants as common carriers, and was conveyed by them to *Exeter*, where they were burnt whilst on the Appellants'

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line of railway. The Appellants were clearly the carrier of the goods, and were to be paid for the carriage by arrangement with the Great Western Railway Company. And, although they were attended by a guard of the Great Western Railway Company, I apprehend that, in the case of common carriers, if the goods were accidentally burnt whilst in the course of carriage, the carriers would be liable, unless some special contract were made, though the servant of the owner or some third person went with them, unless the loss was occasioned by the act or neglect of such servant.

But it was said that there was no contract for the carriage of the goods between the Plaintiff and the Appellants. This I think is a mistake. In my opinion the dealing between the Plaintiff and the Great Western Railway Company, and by them with the Appellants, had the effect of making a contract by the Plaintiff through the Great Western Railway Company as his agents for this purpose, for the carriage of the goods from *Bristol* to *Exeter* on their way to *Torquay*. And as there were no special terms upon which the goods were received by the Appellants, they must be understood to have received them upon the ordinary terms and liability of common carriers for hire; and I therefore think that the Appellants were liable for the loss occasioned by the fire. I therefore answer your Lordships' question in the affirmative.

27 July.

Lord *Chelmsford* (after fully stating the facts and the question raised on the case) said:

After carefully considering the case, and examining the judgments and the opinions which have been delivered, I have come to the conclusion that the judgment delivered by the Court of Exchequer was correct, and ought to have been affirmed. The case of *Muschamp v. The Lancashire*

and Preston Railway Company, upon which that Court mainly relied, differed from the case before your Lordships in this respect, that there were no conditions in the contract, but it was created merely by the receipt of a parcel by the railway company, to be delivered at a place on another line. Is there anything, then, in the special terms of this contract which excludes the application and authority of that case? It was contended, in the course of the argument, that if the 10th condition is inconsistent with the contract on the face of the note, it must be rejected. As, however, the goods were received expressly "on the conditions stated on the other side," I do not think that any one of the conditions can be dispensed with; nor, if the 10th condition bears the meaning given to it by the Plaintiff, would it be at all necessary to deprive it of its effect. A contract to convey goods from *A.* to *B.*, with a condition that, for a certain part of the journey, the company will not be responsible, will be no more inconsistent with the absolute contract for the whole journey, than where a carrier undertakes to convey goods, with a condition that for certain descriptions of goods he will not be liable at all.

The question turns upon the true meaning of the 10th condition. It is said that this condition expressly exonerates the Great Western Railway Company from liability beyond the limits of that company's own railway; but I cannot understand this to have been its object, or to be its effect. It appears to me rather to contain provisions for the *delivery*, than, strictly speaking, for the *carriage* of goods. The 7th condition states the mode in which the company will deliver goods from the different stations on the railway, addressed to places within the limits of the local regulations for delivery. The 10th condition then proceeds to deal with the subject of goods addressed to consignees resident

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beyond the limits of the company's local regulations for *delivery* of goods from the different stations on the railway; and after stating that they will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, or be warehoused, at the discretion of the company, it goes on—"but the charges of such carrier will be added to those of the company, and the *delivery* of the goods by the company will be considered as complete, and the responsibility of the company will be considered to have ceased, when such carriers shall have received the goods for farther conveyance." So far I think there can be no doubt that this condition relates to what may be properly termed the delivery of goods. But it proceeds—"And the company hereby farther give notice, that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond their said limits."

These last words clearly mean beyond the limits of the company's local regulations, and "beyond the extent of their own railway," which also, in this 10th condition, means beyond those stations upon the railway from which the goods are forwarded for delivery by public carrier or otherwise; and the last passage in the condition, exonerating the company from liability for loss, which I have just read, does not extend the provision farther. The words "goods so sent by them" can only refer to goods sent, as previously mentioned, for delivery. And again, the words "beyond their said limits" apply (as before) to the limit of the company's local regulations.

This condition, therefore, appears to me to have no application at all to the present contract, which is for the conveyance of goods that are to be sent by the Great Western Railway Company to a place on the line of another company. That the 10th condition was considered

to be inapplicable to the contract appears from this, that the charges of the carriers beyond their own limits were not added to those of the company, but the whole amount is charged by the Great Western Railway Company for the entire journey from *Bath* to *Torquay*, and is styled "the company's charges." Considering that the charges upon the other lines may possibly not be the same as those on the Great Western Railway, this appears to be a strong circumstance to show that the Great Western Railway Company took upon itself the whole duty of conveyance of the goods to *Torquay*. If the true meaning of the 10th condition is that which I have stated, then there is an express contract with the Great Western Railway Company for the conveyance of the goods from *Bath* to *Torquay*, and the case of *Muschamp v. The Lancashire and Preston Railway Company* exactly applies.

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In determining this question, I think it not unimportant to observe the mode in which the conveyance was effected: the same van in which the goods had been conveyed from *Bath* to *Bristol* being placed upon the line from *Bristol* to *Exeter*, and the same guard, the servant of the Great Western Railway Company, continuing to accompany them throughout the journey, which can only be explained by the Company having undertaken safely and securely to convey the goods to *Torquay*.

I think, therefore, that the contract was entire, was for the whole journey from *Bath* to *Torquay*, and was made with the Great Western Railway Company alone; that the goods were carried on the Defendants' railway under the contract, and that the Defendants are consequently either not liable at all, as no agreement was entered into with them, or that, if the contract in any way attaches to them, the exception as to loss by fire accompanies it, and exonerates them from liability. In my opinion, the judg-

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ment of the Court of Exchequer Chamber ought to be reversed, and the judgment of the Court of Exchequer affirmed. I may add, that my noble and learned friend, Lord *Brougham*, who heard the whole of the argument, agrees entirely in this opinion.

Lord *Cranworth* :

My Lords, my noble and learned friend has gone so fully into this case, that, concurring as I do entirely in the result at which he has arrived, I do not think it necessary to trouble your Lordships at any great length. I think that the contract to carry the goods to *Torquay* station was one undivided contract between *Collins* and the Great Western Railway Company. This would certainly be so if the contract is not varied by the 10th condition from what would be its ordinary import. The case of *Muschamp v. The Lancashire and Preston Railway Company* (o), followed by several other [cases, establishes this to be the duty *primâ facie* undertaken by a railway company receiving goods to be forwarded to any place, whether situate on or off the line of that company's railway.

The question, therefore, turns entirely on what is the true construction of the 10th condition. It is said that there were goods addressed to a consignee resident beyond the limits of the company's local regulations, and so were to be forwarded by them from *Bristol*, their last station, by some other railway or carrier. But even if the condition had gone no farther, I do not think that that would be a reasonable construction to put on it, for it must be read in connexion with the paper called the receipt note on which it was endorsed.

The clear import of that paper, taken by itself, is that the company received the goods from *Collins*, under an

(o) 8 Mee. & Wels. 421.

engagement to convey them to *Torquay* station; and reading it with the 10th condition endorsed on it, I think *Collins* must have understood that the company contracting with him, that is, the Great Western Company, meant to represent *Torquay* station as one of the stations on the railway referred to in the third line of the condition, and from which the company was to forward the goods by carrier if necessary. A person sending goods by a railway cannot be supposed to know, in the case of a continuous line, who are the owners of its different portions. He has a right to suppose, when the officers of the company at one extremity receive goods to be delivered at the other extremity, either that the whole line belongs to them, or, at all events, that they mean so to represent it, and that they contract on that footing.

The public carrier, referred to in the 10th condition, means a public carrier from the station at *Torquay*. This is the construction which the paper *prima facie* imports. And if the directors of the Great Western Railway Company meant to limit their liability to delivery at *Bristol*, then they ought so to have stated in a manner incapable of being misunderstood.

The subsequent provision as to the charge for the carriage seems to me strongly to point to the same result. It is this: "The charges of such carrier will be added" — [*his Lordship read the passage*].

Now, looking at the receipt-note, it appears that the whole charge, 9*l.* 13*s.* 5*d.*, was received by the Great Western Railway Company, under the head of "Company's charges." Considering, then, that the goods were to be taken to *Torquay* station, that the company's charges were represented at 9*l.* 13*s.* 5*d.*, and that there was no charge except the company's charge, the inference which the consignor would necessarily draw must be, that the

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company would convey the goods to *Torquay*, for conveyance to which place the company had charged and accepted one entire sum.

It is farther to be observed, that the amount of the company's charges for the carriage of goods is regulated according to the several classes to which they belong; and this classification extends over the whole line. This would naturally induce the consignor to suppose that he was making a single contract, and that with the Great Western Railway Company, who received the goods; for it would hardly be reasonable to suppose that exactly the same classification and the same rate of charge would be adopted by the other companies possessing other parts of the line.

I have considered the case on the assumption that *Torquay* station is beyond the limits of the company's local regulations for delivery of goods from the stations on the railway. There was, however, no evidence of this. And if it be said, that the Court must take judicial notice of the distance of *Torquay* from *Bristol*, I answer, that it would be by no means unreasonable that the Great Western Railway Company should undertake the delivery of goods at any station on a railway forming a continuous line with its own, charging for the transit on that line as if it were its own. And, in the absence of proof as to what the local regulations are, I am by no means satisfied that such may not be the case; a view of the subject strengthened by the circumstance that an officer of the Great Western Railway Company accompanied the goods on the line beyond *Bristol* until they were destroyed.

My Lords, for these reasons, I am of opinion that the judgment ought to be for the Appellants. Before I quit the case, I must observe that there was a matter of form which created some doubt in my mind, namely, whether

looking at the Act of Parliament, which requires the grounds to be stated where a new trial is granted, it is open to us to decide this case upon the grounds on which we have decided it. The rule *nisi* was granted "on the ground that the van and goods lost or damaged were received and carried by the Defendants under a contract, by the conditions of which the Defendants were not liable for loss or damage by fire." Now, if the question had been whether, supposing the Great Western Railway Company to have sent these goods, as agent for *Collins*, by means of the *Bristol* and *Exeter* Railway, that portion of the contract between *Collins* and the company which related to loss or damage by fire was to be imported necessarily into the contract made with the *Bristol* and *Exeter* Railway Company, I confess that upon that subject I should have entertained very considerable doubt. But I think, that attending accurately to the terms of the rule *nisi*, we are quite justified in doing that which was evidently the intention of the parties in the argument, to treat it as if this question was open. If it is looked at accurately, it says, "on the grounds that the van and goods lost or damaged were received and carried by the Defendants under a contract, by the conditions of which the Defendants were not liable for loss or damage by fire." That evidently means, that the Appellants were not liable to *Collins* for loss or damage by fire, because, in truth, they were not liable to him at all.

Lord *Wensleydale* :

The case resolves itself into a question of the construction of a contract entered into between the Plaintiff below and the Great Western Railway Company, upon the receipt of the Plaintiff's goods at *Bath*. It is an ill-penned contract, and it is not surprising that those whose

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duty it is to construe it should form different opinion upon its meaning. I have had considerable difficulty making up my mind upon it, but after much consideration I do not find reason to differ from the view taken of the case by my two noble and learned friends who heard the argument at your Lordships' Bar.

I think the 10th condition endorsed on the receipt not upon which the question mainly depends, is rather to be construed as applicable to goods carried solely on the Great Western Railway to one of its stations, and consigned to persons living beyond its local limits for delivery to whom the company is to have an option to send by carrier or private hand, as opportunity may offer, or not to send at all, but to allow the goods to remain at the risk of the owners pending communication with them. This condition does not appear to me to have been intended to apply to the transmission of goods by another continuous line of railway not belonging to the Great Western Railway Company, it relates to *delivery* only of the company itself of goods carried on its own line. The expression in the receipt note "to be sent to *Torquay*" is ambiguous and inaccurate on either supposition, either that the Great Western Railway Company was to carry all the way, or to carry part of the way, and to transmit them for the rest of the way, to be carried by another railway company. But it is consistent with the supposition that the Great Western Railway Company was to be responsible for their reaching *Torquay*, and being there delivered to the Plaintiff *Collins* or his agent. And the fact that one single undivided charge is to be paid to the Great Western Railway Company for the whole journey, is strong to show that that company was to be so responsible. It is natural to suppose that if it was intended that the Great Western Railway Company was

to be responsible for the carriage along its own line only, and to be agent to make another contract with another company or companies, for the rest of the transit, on behalf of the consignor, the reward for that carriage to be kept by the Great Western Company should be distinctly and expressly specified, and not left to form an undefined part of an entire sum paid down by the consignor. That seems to show that the company was left to make its own bargains with all the forwarding companies, receiving a certain sum from the consignor for the whole journey. That the Great Western Company would afterwards share that sum with those other companies, makes no difference as to its own liability. It may, indeed, have been the intention of the Great Western Railway Company to contract to carry along its line only, but if that was so, it has not been expressed with sufficient clearness, and if it is important for that company in future cases to limit its liability to its own line, the terms of the present receipt note should be altered.

On the whole, though I have felt considerable doubt in the course of this proceeding, I think the Judges forming the minority who have given their opinions to your Lordships are right, and that the judgment of the Court below ought to be reversed.

Lord Kingsdown :

My Lords, I am not prepared to dissent from the opinions which have been expressed by my noble and learned friends, although I own I look upon the case as one of great doubt. If the question was, as one or two of the Judges in their opinions seem to consider, whether the case having been properly left to the jury, there was evidence upon which the jurors might find the verdict complained of, I should have had great difficulty in

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saying that there was not. But the case seems to depend entirely on the construction to be put by the Court on written contract; and as to that, although not without some hesitation, I acquiesce in the view which has been taken by my noble and learned friends.

Judgment of the Court of Exchequer Chamber reversed.

Lords' Journals, 27 *July* 1859.

SIR MOSES MONTEFIORE - - - Appellant.

PETER BROWNE - - - Respondent.

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*Family Deeds.
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A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. Certain estates were conveyed to trustees, with a power to sell, on the consent in writing, of A. and B., or the survivor, and to apply the produce of the sale in payment of debts therein specified. A. was indebted to D., as trustee for an infirmary, and A. and B. had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up against A. and against B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves. He was a party to the deed, and executed it :

Held, that this deed created a trust in favour of the infirmary of which he was a trustee.

In this deed there was a power of revocation to be exercised by A. and B. ; A. died without exercising it :

Held, that the power of revocation was then at an end.

In the deed executed by A. and B., there was a conveyance to certain persons, with a power of sale, to be exercised with the consent, in writing, of A. and B., or the survivor of them. A. died without having concurred in any consent to a sale. B. afterwards borrowed money from an insurance company, the repayment of which was secured by mortgage of his estates, of which those which were the subject of the first deed formed part. In the mortgage, to which the creditor under the first deed was a party, and which fully recited that deed, there was a power of sale given to the mortgagee :

Held, that this was a consent, in writing, sufficient to satisfy the words of the first deed.

A mortgage given by B. in 1832 to an insurance company, from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by A. and B., for the settlement of certain family estates, and for the payment of some of A.'s debts, and recited that in that deed a sum of 3,200 l. was due to D., as trustee for an infirmary, on a judgment against A. and B., that that money, with interest, had been paid off, and that it was intended to enter satisfaction on that and all other judgments affecting the mortgaged lands. There were separate judgments, at the suit of D., against A. and against B., dated in 1810 and 1812, but a war-

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rant of attorney given by *D.* in 1819, authorised satisfaction to entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mortgage. The mortgage caused satisfaction to be entered on the roll as to the separate judgments of 1810 and 1812, but made no farther inquiries :

Held, that as the mortgage itself had recited a joint judgment for a specific sum, the mortgagee had been guilty of negligence in not looking farther into the matter, and must therefore be taken to have had a proper notice of the unsatisfied claim under the decree of 1823.

A Court of Equity may, by additional orders, without a bill of review or a re-hearing, deal with a fund which is still in court.

But where the party so requiring the Court to deal with the fund might have appeared at an earlier stage of the cause, he will be required to pay all the additional costs which have been occasioned by the imperfect manner in which his claim was brought forward.

The Incumbered Estates Court, in a case where the rights of parties are under adjudication in the Court of Chancery, is ancillary to the Court of Chancery, and though it has ordered a sale of estates, it may delay the distribution of the fund obtained by such sale until the Chancellor has adjudicated on a claim presented to its notice.



IN 1810 the Right Honourable *Denis Browne* was governor and trustee of the County of *Mayo* Infirmary and in that capacity he advanced a sum of 2,200 *l.* (of the then *Irish* currency) being the money of the infirmary to *Dominick Geoffrey Browne*. To secure the repayment of this sum, with interest, a bond, in the penal sum of 4,400 *l.* was given by *Dominick Geoffrey Browne* and *Dominick Browne*, his son, the latter of whom subsequently became Lord *Oranmore*. Separate judgments were, as of *Trinity* Term 1810, entered up against these two obligors in favour of *Denis Browne*, as trustee of the *Mayo* Infirmary. In 1811, *Denis Browne* advanced a farther sum of 1,000 *l.* of the infirmary money to *Dominick G. Browne* and took his bond to secure the same in the penal sum of 2,000 *l.*, and a similar judgment, as of *Easter* Term 1812

was entered up on this bond. In 1815, *Denis Browne* advanced two sums of 1,600 *l.* and 500 *l.*, also the money of the *Mayo Infirmary*, to *Dominick G. Browne* and *Dominick Browne*, on their joint and several bonds and warrants of attorney in the penal sums of 3,200 *l.* and 1,000 *l.*; and in *Trinity Term* 1815 separate judgments against *Dominick Browne* alone were entered up thereon. Shortly before 1819, *Dominick G. Browne* and his son, *Dominick*, were desirous of re-settling the family estates, to effect which it was arranged that *Denis Browne* should execute warrants to declare the judgments of 1810 and 1812, satisfied, on *Dominick Geoffrey Browne* and his son, *Dominick*, executing to him, as trustee for the infirmary, a new bond (with a warrant of attorney to enter up judgment) in the penal sum of 6,400 *l.* to secure 3,200 *l.* *Dominick G. Browne* and his son, *Dominick*, accordingly, executed in favour of *Denis Browne*, for the sum of 6,400 *l.*, their joint and several bond, dated 5th *February* 1819, together with a warrant of attorney to enter up judgment thereon, and *Denis Browne*, on the 20th *April* 1819, executed warrants of attorney in their favour to declare satisfied the judgment of 1810 against both these persons, and the judgment of 1812, which had been obtained against *Dominick G. Browne* alone. The arrangements for the re-settlement of the estates were not completed till 1823, when certain deeds were executed for that purpose. Two of these were indentures dated 24th of *June* of that year. The first was made between *Denis Browne* of the first part, *George Clendinning* of the second part, *Dominick Geoffrey Browne* of the third part, *Dominick Browne* of the fourth part, various other persons and parties not necessary to be named, and *George* and *Alexander Clendinning* of the tenth part. By this indenture, *Dominick G.* and *Dominick Browne*, appointed certain lands

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called *Coolaran, Lacka, Cahiralee, and Cahirtemore*, in the county of *Galway*, to *G. and A. Clendinning*, and their heirs, upon trust that they should, as soon as conveniently might be, "with the consent in writing of *Dominick G. Browne* and *Dominick Browne*, or the survivor of them, sell the same," and hold the money on the trusts to be declared by the following indenture.

The other indenture, which was dated on the same day after reciting the former deed, and likewise a limitation of *Dominick Browne* of a rent-charge of 900 *l.* a year during the life of himself and his father, it was declared that *G. and A. Clendinning* should stand seised of the money raised by the sale of the said lands on trust, in the first place, to pay the expenses of the sale, &c.; in the second place, raise a sum of 8,275 *l. Irish* currency, and apply the same on such trusts as *Dominick G. Browne* and *Dominick Browne* should, by any deed, &c., in writing, with or without the power of revocation, appoint, and in default of such appointment, out of the said sum of 8,275 *l.* pay and discharge the debts and legacies thereafter mentioned that is to say, "the sum of 3,200 *l. Irish* currency, due to the Right Honourable *Denis Browne*, as trustee for the *Mayo Infirmary*, on a judgment against the said *Dominick Geoffrey Browne* and *Dominick Browne*," certain legacies bequeathed in the part recited will of *Peter Lynch*, certain other sums of money, some of which (their amounts were not specified) were described as borrowed by *Dominick Geoffrey Browne* and *Dominick Browne* for the sole benefit of the latter, and pay the surplus, if any, of the 8,275 *l.* unto *Dominick Browne*, his heirs, &c. Till the sale the trustees were to apply the rents on such trusts as *Dominick Geoffrey* and *Dominick Browne*, should by deed appoint, and in default of such appointment keep down the interest due for the principal sum of 3,200 *l.*, and for

the legacies of Mr. *Lynch*, and pay the remainder to *Dominick Geoffrey Browne* for his use for life, and after his death to *Dominick Browne* for his use. If the sale should be made during their joint lives, and should produce more than the principal of the 3,200 *l.*, and the legacies under Mr. *Lynch*'s will, then a deduction was to be made from the amount of *Dominick Browne*'s rent-charge of 900 *l.* a year in proportions therein specified. And it was declared, that *Dominick Geoffrey Browne*, as between himself and his son, should keep down the interest on the unspecified debts. There was a general power of revocation and new appointment reserved to *Dominick Geoffrey* and *Dominick Browne*, "during their joint lives, by any writing sealed and delivered by them and attested by two witnesses."

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Both these deeds were executed by *Denis Browne*.

Dominick Geoffrey Browne died in *May* 1826, without having exercised his power of revocation and new appointment. *Denis Browne* died in the year 1827, without having entered up judgment on the bond of *February* 1819. He had previously made a will, by which the Respondent was appointed his executor, and the will was proved by the Respondent.

In 1832, *Dominick Browne* applied to the directors of the *Alliance Insurance Company* to lend him 56,000 *l.*, on the security of a mortgage (amongst other lands) of those comprised in the indenture of 1823, and the application having been granted, these lands (with the others) were, by a deed of mortgage, dated 26th *March* 1832, conveyed to the Appellant and other persons representing the Alliance Company. The mortgage deed (to which, among other persons, the two *Clendinnings* were parties) recited the deeds of 1823, and described the trust to be to sell

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and then “to pay and discharge, with or out of the said sum of 8,275 *l.*, the several sums of money therein and hereinafter mentioned ; (that is to say), the sum of 3,200 *l.* to the said *Denis Browne*, as the trustee of the *Mayo Infirmary*, on a judgment against the said *Dominick Geoffrey Browne* and *Dominick Browne*,” the legacies bequeathed by *Lynch, &c.* It then recited that no sale had been made, that *Dominick Geoffrey Browne* had died without having concurred with *Dominick Browne* in executing their joint power of appointment over the 8,275 *l.*, that the said sum of 3,200 *l.* [but this recital was untrue], and all interest thereon had been paid by *Dominick Browne*, and that, “satisfaction is intended to be forthwith entered up on the record of the said judgments for securing the same, and all other judgments affecting the said lands, &c.” The mortgage contained a power to the mortgagees to sell if, within six months after calling in the debt, it should not be satisfied with all interest. The representatives of the *Alliance Company*, on the 31st *May* 1832, searched the roll of judgments, and procured satisfaction to be entered upon the roll of the judgments of 1810 and 1812, under the warrants of attorney granted for that purpose by *Denis Browne*, on the 20th *April* 1819. About the time of the execution of the mortgage to the *Alliance Company*, *Dominick Browne* paid to the Respondent, who was then resident abroad, the amount due on the judgments of 1815, and the Respondent thereon executed warrants of attorney to enter satisfaction on those judgments.

In *Michaelmas* Term 1838, the governors of the *Mayo Infirmary* entered up judgments on the bond of the 5th *February* 1819, against *Dominick Browne* (who had, in 1836, become Lord *Oranmore*), the surviving obligor in the bond, and against the executors of the other obligor. On

the 26th of *March* 1846, the Respondent, *Peter Browne* (who was still abroad) assigned this judgment to *Thomas V. Clendinning*, the then treasurer of the infirmary, in trust for that institution.

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On the 1st *August* 1839, Lord *Oranmore*, to cover the interest then due to the infirmary, which amounted to the sum of 1,217*l.* 2*s.* 11*d.*, executed to *T. V. Clendinning*, who had then become trustee for the infirmary, a bond with a warrant of attorney, to enter up judgment thereon, in the sum of 2,434*l.* 5*s.* 10*d.*, and, as of, *Trinity* Term 1839, judgment was afterwards entered up. And up to 1842 Lord *Oranmore* paid interest on this sum, and on the principal sum of 3,200 *l.*

On the 14th *August* 1843, the Appellant and the other directors of the *Alliance* Company, filed their bill of foreclosure on the mortgage of the 26th *March* 1832. The Respondent was, as the executor of the Right Honourable *Denis Browne*, and as a judgment creditor, made a party to this bill, but being beyond the jurisdiction was not served with it. A decree for an account was pronounced on the 4th *November* 1845. Under the decree of *November* 1845, *T. V. Clendinning* filed a charge, by which, as trustee for the *Mayo* Infirmary, he claimed a sum of 6,059*l.* 16*s.* 7*d.* (composed of two sums of 4,276*l.* 1*s.* 7*d.* and 1,783*l.* 15*s.*) on the judgments of *Michaelmas* Term 1838 and of *Trinity* Term 1839. In stating this charge he alleged that *Peter Browne* was resident at *Copenhagen*, and that interest had been paid by Lord *Oranmore* up to *August* 1851.

On 1st *May* 1846, the Plaintiffs filed their discharge from this claim, submitting, amongst other things, that the executors of *Denis Browne* were, if any, the proper parties to file such charge. Before any adjudication was made on the charge and discharge, or any report under the decree

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of 4th *November* 1845, *Thomas V. Clendinning* died, and the Plaintiffs did not take any steps to revive the suit against his personal representative, or to bring before the Court any person to represent the *Mayo* Infirmary.

On 20th *June* 1849, the *Master* made his report, stating that *Thomas V. Clendinning* was dead, and that in respect of the judgments of 1838 and 1839, there were due the two sums of 4,276*l.* 1*s.* 7*d.* and 1,783*l.* 15*s.*, with priorities as to these two debts, as debts of 1838 and 1839 respectively; but that he could not report to whom these sums were payable, nor in whom the judgments were then legally vested, no person since the death of *T. V. Clendinning* having appeared before him to claim their amounts.

On the 16th *November* 1849 the cause was heard on farther directions, when the report was confirmed, and it was ordered that out of the produce of the sales thereby ordered to be made, the creditors should be paid according to the report, which had only given the claim of the *Mayo* Infirmary the priority of a debt of 1838, and had in that way postponed it to the mortgage deed of 1832.

On the 20th *November* 1849, the Appellant and Mr. *Samuel Gurney*, the surviving trustees of the *Alliance* Insurance Company, presented their petition in the Incumbered Estates Court, praying to have a sale of the lands mortgaged to them, and which included those that were comprised in the deed of *June* 1823. The order for the sale was made, and the *Alliance* Company purchased the lands. The purchase money of these included lands was insufficient to meet the demands of the *Mayo* Infirmary, if they were treated as dating only from the judgment of 1838, according to the *Master's* report, and in *May* 1853 a petition was presented to the Incumbered Estates Court on that subject. The petition was dismissed on the ground that the

Incumbered Estates Court was bound by the report and the decree thereon in the Court of Chancery; but judgment was delayed that an application might be made to the Court of Chancery. A petition was accordingly presented to that Court by the Respondent (who had then returned to *Ireland*), as trustee on behalf of the *Mayo* Infirmary, praying to be at liberty, notwithstanding the previous report and decree, to go before the *Master* as to his right, as such trustee, to the sum of 3,200*l.* and interest secured by the two deeds of the 24th *June* 1823. On the 6th *November* 1854, the *Master of the Rolls* made an order allowing the prayer of the petition, but did not express any opinion as to the validity of the claim. On the 8th *June* 1855, the *Master* reported in favour of the claim, and found that it was a charge on the lands mentioned in the deeds of 24th *June* 1823. The Appellant objected to the report that the debt of 3,200*l.* being merely a judgment debt, was not effectually charged on the lands by the deeds of *June* 1823, that *Denis Browne* was not a *cestui que trust* under those deeds, that the trust for the sale under the first deed was only capable of being exercised with the consent of *Dominick Geoffrey Browne*, and of *Dominick Browne*, or the survivor, and that no such consent had been given before the mortgage to the Plaintiffs, and that the claim was barred by the Statute of Limitations. These objections were on the 3d *November* 1855 (a) overruled by the *Master of the Rolls*, who, however, refused the application to vary the report, but declined to confirm it, as that might indirectly affect the *Lord Chancellor's* decree of 16th *November* 1849, which his Honor had no jurisdiction to vary. This was done without prejudice to what the governors of the infirmary might be advised to do by any other application.

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(a) 4 Ir. Ch. Rep. 470, *nom.* Gurney *v.* Lord Oranmore.

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to the *Lord Chancellor*, in order to have their priority established as of the date of *June 1823*.

This order of the *Master of the Rolls* was affirmed by Lord Chancellor *Brady*, on appeal, 24th *January 1856*.

In *June 1856* the Respondent applied to the *Lord Chancellor (b)*, who made an order in substance confirming the *Master's* report of 8 *June 1855*, and declaring that the sum of 6,593 *l. 2 s. 5 d.* was due to the Respondent as executor of *Denis Browne*, trustee for the *Mayo Infirmary*, together with accruing interest on the principal sum of 3,200 *l.* which had been well charged on the lands mentioned in the deeds of *June 1823*, and with priority of that date.

The appeal was brought against this order, and against all those which it in substance confirmed (*c*).

The *Attorney - General* (Sir *F. Kelly*) and Mr. *Braithwaite* (Mr. *Rogers* was with them) for the Appellant:

The first question here is, does the language of the deed of 1823 create a charge in respect of the 3,200 *l.* on the estates comprised in that deed, and constitute a trust for the *Mayo Infirmary*, which the *cestui que trust* may at any time enforce. Second, is the deed a mere voluntary act on the part of the two *Brownes*, and is it a mere matter of contract between themselves, which they can revoke if they think fit. Thirdly, has the *Alliance Company* been guilty of any such gross negligence in not making inquiries into this claim of the *Mayo Infirmary* as to entitle the Respondent to insist on it against that company as a charge upon the estate.

First, as to the construction of the deed, no charge has

(*b*) 5 Ir. Ch. Rep. 436, *nom.* *Gurney v. Lord Oranmore*.

(*c*) There was an argument as to the effect of the Statute of Limitations. No judgment was delivered upon it, and it is, therefore, not reported.

been created, and no trust constituted, by this deed. There is no title to enforce the claim of the infirmary, except on the contingency of a sale which could not be had without the consent of the two *Brownes*, or the survivor of them, and that consent has never been given. Unless the estate was sold, the power to raise the 8,275 *l.* and to pay off the 3,200 *l.* did not arise. If, therefore, there was any trust created by the deed, it was only a conditional trust, and the condition has never been performed. There is consequently no absolute charge of the 3,200 *l.* upon the estate; and as to the interest, it is, unless the *Brownes* shall otherwise order, to be paid out of the rents and profits of the estate, but is not in any way a charge upon the body of the estate. The *Mayo* Infirmary has no power to call for a sale, either for payment of principal or interest. The principal was only chargeable on the estate by the consent of the *Brownes*, and the interest was not chargeable upon it at all. Besides, the language of the clause implies an annual settlement and balancing of the accounts, so that it is the fault of the creditor if there is any arrear; he cannot make good his own default by a forced sale. If the infirmary has any remedy against the trustee for not keeping down the arrears, or any remedy against Lord *Oranmore* personally, it has none against the estate itself in the hands of the mortgagee.

Secondly, there is no obligatory trust under this deed. There can be no such trust where the application of the whole and every part of the money depends on the unfettered will of the maker of the instrument. *Synnot v. Simpson* (*d*), which was held to be a case of trust, because the creditor was a party to the arrangement, is not a case decisive of the present, for though *Denis Browne* is a party

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(*d*) 5 H. L. Cas. 121.

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to this instrument, he is not a party in the character of a trustee for the infirmary; he only became so because he had some legal estate in him, and without his joining in the conveyance there could be no sale. Had the infirmary been a party to the deed, so as to raise a contract between itself and the *Brownes*, there would have been a recital of something which amounted to a consideration moving from the infirmary to the *Brownes*, and power would have been given to the infirmary to compel the raising of the money, instead of the whole matter being left in the discretion of the *Brownes*. The case of *Law or Evans v. Bagwell* (e) shows that, under such circumstances as exist here, the creditors have no right to treat this deed as creating an obligatory trust. There the maker of the deed reserved to himself a power over the fund, and Lord Chancellor *Sugden*, in judgment, said, "The doctrine in *Wallwyn v. Coutts* (f) has gone beyond the intention of those who originally introduced it. I do not, however, mean to express any opinion as to the extent to which the doctrine ought to be maintained. No doubt if a creditor hearing of the existence of an instrument of this nature, for the benefit of which he never made any stipulation, should be allowed, at his own discretion, to enforce that benefit, if, half an hour after, he acquired this information, he should be allowed to file a bill to carry into execution the trusts of the deed in his favour, the practice would be a serious inconvenience." In *Wallwyn v. Coutts* (g), no creditor was a party to the deed, which was held a voluntary act between the father and the son, and quite incapable of enforcement. *Garrard v. Lauderdale* (h) applies to the present case, both in principle and

(e) 4 Dru. & War. 398.

(f) 3 Mer. 707.

(g) 3 Mer. 707.

(h) 2 Russ. & Myl. 451.

details, and *Smith v. Hurst* (i) shows, that where the deed is, as it is here, a mere deed of management, it cannot be set up as a trust.

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Thirdly, there has been no negligence here on the part of the *Alliance* Company. There was, in the deed, a misdescription of the creditors, which misled those who read it; and where that is the case, the persons so misled are not to suffer, nor are they to be treated as having had notice. *Jones v. Smith* (j). There a man, before he advanced money on mortgage, inquired of the intended mortgagor and wife whether any settlement of the property had been made on their marriage, and was told that there had been a settlement of the wife's fortune only, but not of the husband's estate. It was this estate that was offered as security, and the money was advanced upon it without farther inquiry. The representation was untrue; the mortgagee was held not to be bound in consequence of having acted on it, although the settlement, of the existence of which he was informed, did contain a charge on the husband's property. *Taylor v. Baker* (k) is not applicable here, for there the purchaser had full notice of the prior incumbrance: he knew nothing of it in this case.

The doctrine of constructive notice only applies where a man is guilty of gross or culpable negligence in not obtaining knowledge which it was in his power to obtain: *Ware v. Lord Egmont* (l), *Hewitt v. Loosemore* (m), *Colyer v. Finch* (n). It only applies in two cases; first, where a man has notice of the fact of an incumbrance, but does not make any inquiry as to its nature, and so does not obtain the knowledge which inquiry would have given

(i) 10 Hare, 30.

(j) 1 Hare, 43. 1 Phil. 244.

(k) 5 Price, 306.

(l) 4 De G. M. & Gord. 460.

(m) 9 Hare, 449.

(n) 5 H. L. Cas. 905.

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him ; or, secondly, where his conduct shows that he had a suspicion of the truth, but he wilfully avoided inquiring into it. The present case does not fall within either of those descriptions, for the Appellant here did look for the judgment of which the deed gave him information, found it, and, finding it, and finding the whole sum due to amount to 3,200 /., believed, of course, that it was the only judgment that affected the property. He was informed by the same deed, and had reason to believe, that that judgment was paid off. He, perhaps, did not show a suspicious caution ; but, in *Jones v. Smith*, on appeal, Lord *Lyndhurst* (o) said, that a mere want of caution would not affect the rights of a mortgagee. That principle was applied in *West v. Reid* (p), although the particular circumstances of that case showed a ground for arguing that there had been more than a mere want of caution. There, a policy effected on the life of *D.* was assigned to *W.*, whose solicitor entered a memorandum in the office of the company, directing all letters relating to the policy to be sent to him, and he paid the subsequent premiums. It was held that the office had not had notice of the assignment, and that on the bankruptcy of *D.*, the policy passed to his assignees, but it was also held, that the executors of *W.* were entitled to a lien on it for the premiums, the amount of which was to be satisfied out of the money payable on the policy. The negligence which, in such a case, would make a man liable, was there said to be disregard of a fact brought to his notice. There was no negligence of that sort here.

But the authorities also show, that where a person claims under a deed duly registered, he is not affected by

(o) 1 Phill. 244.

(p) 2 Hare, 249.

the doctrine of constructive notice, unless there is fraud; and, in such a case, even a *lis pendens* is not notice: *Wyatt v. Barwell* (q), *Jolland v. Stainbridge* (r).

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Then, as to the form of the proceeding, everything that has been done here is irregular: *Cattell v. Simons* (s). The declaratory decree of the *Lord Chancellor*, pronounced in 1849, could only be set aside by a petition for re-hearing, or a bill of review, *Champernowne v. Brooke* (t). There has not been any such proceeding here.

Sir *R. Bethell* and Mr. *Walshe* (of the Irish Bar; Mr. *Wickens* was with them), for the Respondent:

The deeds of 1823 constituted a trust. They were the result of a contract between the father and son with respect to the debts of the father and one of the creditors, who was a creditor in respect of money advanced by the *Mayo Infirmary* to the father, was a party to the deeds. The power of revocation in the deeds of 1823 was a joint power, it was never executed, and the trusts thereby created were never by deed revoked. They became, on the death of *Dominick Geoffrey Browne* indefeasible. In no respect were they revocable except under that power, for they were created for a valuable consideration, and they were communicated to the person who was to take a benefit under them; *Synnot v. Simpson* (u), is therefore applicable here, and the principles of equity clearly explained by Lord *Cottenham* in *Bill v. Cureton* (v), show that, under circumstances such as exist here, the deeds are not revocable, for here all that was wanting in that case is supplied. *Scott v. Porcher* (w), had applied the same principles to a

(q) 19 Ves. 439.

(r) 3 Ves. 478.

(s) 8 Beav. 243.

(t) 3 Clark & Fin. 4.

(u) 5 H. L. Cas. 121.

(v) 2 Myl. & K. 503.

(w) 3 Mer. 652, 664.

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mercantile transaction. The case of *Siggers v. Evans* (x) goes farther than the present. There *H.* executed a deed, assigning all his property to *S.* a creditor, in trust for *S.* himself and the other creditors, and sent the deed to *S.*, who, on the day after receiving it, declared his assent to it. On the day on which it was sent, a judgment creditor of *H.* delivered a *fi. fa.* to the Sheriff, but it was held that the goods had become the property of *S.*, under the deed which was held not to be revocable, as it had been communicated to *S.*, who had a beneficial interest in it.

Then, has there been any negligence on the part of the mortgagees? Unquestionably there has. These deeds of 1823 were recited in the mortgage of 1832, and the trust to the *Clendinnings* was described as a trust "to pay 3,200 *l.* to *Denis Browne*, as the trustee of the *Mayo Infirmary*, on a judgment against *Dominick G. Browne* AND *Dominick Browne*." The mortgage deed afterwards went on to recite, that "the said sum of 3,200 *l.*, and all interest thereon, hath been paid off and discharged by the said *Dominick Browne*," and that satisfaction was intended to be entered up on the judgments and on all other judgments. The whole matter was, therefore, brought to the notice of the Appellant as representing the *Alliance Company*, and he ought to have instituted inquiries: *Taylor v. Baker* (y), *Jones v. Smith* (z). A grosser case of negligence could hardly be imagined than that which the conduct of the Company, in omitting to make proper inquiries, has exhibited. The Appellant's own case states, that there was, upon the negotiation and the preparation of the mortgage deed, a search for judgments against the two *Brownes*, and there were found the two judgments of

(x) 5 Ell. & Bl. 367.

(z) 1 Hare, 43. 1 Phill. 244.

(y) 5 Price, 306.

1810, the judgment of 1812, and the two judgments of 1815, all of which were at the suit of *Denis Browne*. The deed of 1819 acknowledged, that the debt then due to him was paid, and authorised satisfaction to be entered upon his judgments. If so, it was plain, that the sum of 3,200 *l.* stated, in the mortgage deed itself, to be due on deeds executed in 1823, could not be the sum made up of what was due before 1819, and which had been satisfied in 1819. On the face of the mortgage deed itself it was plain, that the deeds of 1823 referred to some other sum of money; yet no more inquiry was made about the matter.

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Then it is said, that the power of sale was a joint power to be executed in writing, and that there has not been any such execution of it. But the trusts of the deed became indefeasible on the death of *Dominick Geoffrey Browne*, and the power of assenting to the sale was not only in the father and son, but in the survivor. That survivor was *Dominick Browne*, who became Lord *Oranmore*. He mortgaged to the *Alliance* Company, by which he necessitated the sale of this estate, and his so doing must be taken as a consent in writing. The estate was sold, and then the trust deeds of *June* 1823 operated on the proceeds; and, according to those trust deeds, *D. G. Browne* and *D. Browne* were not entitled to the surplus of the 8,275 *l.* till the 3,200 *l.* had been paid. In no respect has this trust been performed.

Then as to the form of the proceeding. The Respondent has been properly admitted to put in his claim. *Clendinning* was dead, and the *Master's* report finding his title to claim, also found that he had died, and that there was then no representative of him before the Court. There was, and is, a fund in Court. So long as there is a fund in Court, the Court has jurisdiction to deal with it, and to

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admit a claimant upon it: *Gillespie v. Alexander* (z). And in *Knor v. Waters* (a) the same course was pursued that has been adopted here. Till a late period, judgments were ordinary securities for debts in *Ireland*, and, therefore, in *Rolleston v. Morton* (b), on a bill for foreclosure and sale of mortgaged lands, all the judgment creditors of the mortgagor were held to be necessary parties, whether such judgments were prior or posterior to the Plaintiff's demand, and whether they were a lien on the legal or on the equitable estate. The practice in *Ireland* was settled by an order made by Lord Chancellor *Sugden* in 1843. The same principle prevailed in *England*, and, therefore, *Brown v. Lake* (c), *Champernowne v. Brooke* (d), and *Cattell v. Simons* (e), are not in point here, for, in all of them, the parties had been throughout parties to the suit, and had been guilty of wilful neglect in claiming their rights. That was not so here: *Clendinning* was dead, and *Peter Browne*, the Respondent, was absent abroad.

The *Attorney-General* replied.

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The *Lord Chancellor* (Lord *Chelmsford*), after full—
 stating the circumstances of the case, said:

Upon the two general objections which arise on the appeal from these four orders made after the final decree of the 4th of *November* 1845, the first, upon the priority established by the decree of the 24th of *June* 1856, depends upon the question, whether, by the deeds of the 24th of *November* 1823, a trust was raised in favour of *Dezair Browne*, on behalf of the *Mayo* Infirmary, which created a charge upon the lands contained in these deeds. It was contended, on the part of the Appellant, that no trust

(z) 3 Russ. 130.

(a) 5 Ir. Ch. Rep., N. S., 430.

(b) 1 Dru. & War. 171.

(c) 1 De G. & Sm. 144.

(d) 3 Clark & F. 4.

(e) 8 Beav. 243.

arose upon the deeds in favour of *Denis Browne*; that, although he was an executing party to them, it was the same for this purpose as if he had been a stranger to the deeds, as he executed not in the character of trustee for the infirmary, but as a necessary party to convey some portion of the estates, and that the principle was applicable which was established by the cases of *Wallwyn v. Coutts* (f) and *Garrard v. Lord Lauderdale* (g); namely, that if property is conveyed by a debtor in trust for the benefit of a creditor who is neither party nor privy to the deed, it merely operates to give the trustees a power to apply the property in payment of the debt, and that this power is revocable by the debtor.

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That the communication by the trustees to the creditor of the fact of such a trust would defeat the power of revocation by the debtor, seems to have been the opinion of the *Master of the Rolls* in *Acton v. Woodgate* (h), and also of Lord *St. Leonards*, in *Browne v. Cavendish* (i), where his Lordship says, "I do not mean to bind myself to hold that in every case a representation to a creditor will give him the benefit of the trust: it must depend upon the character of the representation and the manner it is acted on. On the other hand, I should be sorry to have it understood that a man may create a trust for the benefit of his creditors, communicate it to them, and obtain from them the benefit of their lying-by until, perhaps, the legal right to sue was lost, and then insist that the trust was wholly within his own power."

The present case is much stronger than those where the creditor has merely notice given him of the existence of the trust, because here *Denis Browne* is a party to the

(f) 3 Mer. 707.

(h) 2 Myl. & K. 492.

(g) 3 Sim. 1. 2 Russ. &

(i) 1 Jones & Lat. 635.

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deed, and the endeavour made to confine the knowledge which he acquired by the execution to the character which he executed, is, I think, a refinement which ought not to prevail, but that, as a party, he must be assumed to have become acquainted with the contents of the deed. He knew, then, that provision was made for the payment of the sum of 3,200*l.* to him “as the trustee of the *Mayo Infirmary*,” out of a sum of 8,275 *l.*, which the trustees of the settlement were to raise from the lands and hereditaments comprised in the deed. He had not at that time entered up judgment on the warrant of attorney given with the bond in *February* 1819. The knowledge that his debt was satisfactorily secured would probably induce him to forbear to exercise his power of compelling payment by entering up judgment, as he was authorised to do, and thus the debtor obtained all the benefit of his creditor’s forbearance by means of the trust which he thus created.

But it is said, that the trust was conditional, and that the condition has never been performed. That the whole of it was dependent upon the consent, in writing, of *Dominick Geoffery Browne* and *Dominick Browne* (afterwards Lord *Oranmore*), and the survivor of them, and that such consent has never been given. But it appears to me that the mortgage deed which was executed to the *Alliance Assurance Company* contains within it the consent which is required. It recites the deeds of the 24th of *June* 1823, with the power of sale. It then states, that no sale has hitherto taken place, and that *George Clendinning* and *Alexander Clendinning*, “so far only as relates to the town lands and other hereditaments comprised in the said thirdly hereinbefore recited indenture of release of the 24th day of *June* 1823, and which hereditaments are comprised in the said fifth schedule annexed to these presents, at the request and by the direction of the said

Dominick Browne, testified as aforesaid," that is, by his executing these presents, do "bargain, sell, alien, and release;" and *Dominick Browne* conveys "his equitable estate or interest in the town lands and other hereditaments." If a sale, with consent, is necessary before the trust can arise, the condition seems to be amply satisfied, at least as to the mortgagees, who take with notice of the trust, and with express reference to the very power which they now contend has not been exercised.

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It may be proper to advert for a moment to the argument against the existence of a trust for the payment of the debt of 3,200 *l.* derived from the power of revocation given by the deed to *Dominick Geoffrey Browne* and *Dominick Browne* (Lord Oranmore) during their joint lives: as to that, it may be only necessary to observe, that although the trust might possibly have been in the power of the two jointly, and the creditor may be taken to have accepted it, subject to this power of determining it, on the death of *Dominick Geoffrey Browne* it became absolutely irrevocable.

But the Appellant contends for the priority of the mortgage to the *Alliance Assurance Company* over the debt due to the *Mayo Infirmary*, because the trust in the deed is, that the trustees should, out of the sum of 8,275 *l.*, pay and discharge the sum of 3,200 *l.* *Irish* currency, due to the Right Honourable *Denis Browne*, as trustee of the *Mayo Infirmary*, on a judgment against the said *Dominick Geoffrey Browne* and *Dominick Browne*. Now, there was no such judgment, and the Appellant insists that, having searched and found the two separate judgments of 1810 against *Dominick Geoffrey Browne* and *Dominick Browne*, for 2,200 *l.*, and the judgment against *Dominick Geoffrey Browne*, in 1812, for 1,000 *l.*, amounting together to 3,200 *l.*; this was sufficient to satisfy him, that these were

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the judgments intended by the description in the
 and that he was guilty, therefore, of no laches or neglig
 and cannot be taken to have had notice, either actual
 constructive, of the bond and warrant of attorney
February 1819.

A great many authorities were cited on this part of
 case for the purpose of showing that constructive notice
 cannot be imputed to a party unless his ignorance amounts
 to gross or culpable negligence. I agree in the propriety
 of these decisions, and also in what was said by my
 and learned friend, Lord *Cranworth*, in *Ware v. Lord*
mont (k), that "it is highly inexpedient for courts of equity
 to extend the doctrine of constructive notice; that where
 a person has actual notice of any matter of fact, there shall
 be no danger of doing injustice if he is held to be bound
 by all the consequences of that which he knows to be true.
 But where he has not actual notice, he ought not to be
 treated as if he had notice, unless the circumstance
 such as enable the Court to say, not only that he might
 have acquired, but also that he ought to have acquired
 the knowledge with which it is sought to affect him—
 he would have acquired it but for his gross negligence in
 the conduct of the business in question."

This corresponds with the well-considered explanation
 of the cases of constructive notice given by Vice-Chancellor
Wigram in *Jones v. Smith (l)*, that "where a party charged
 has had actual notice that the property in dispute was, in fact,
 charged, incumbered, or in some way affected, the Court has
 thereupon bound him with constructive notice of facts and
 instruments, to a knowledge of which he would have been led
 by an inquiry after charge, incumbrance, or other circumstance
 affecting property of which he had actual notice."

(k) 4 De G. M. & G. 473.

(l) 1 Hare, 55.

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To apply these principles to the present case, the Appellant had notice by the recital in the mortgage of the deeds of 24th *June* 1823, that the estates were incumbered with a joint judgment against *Dominick Geoffrey Browne* and Lord *Oranmore* for 3,200*l.*; but upon search, he found no such joint judgment entered, but separate judgments against them for sums amounting in the whole to 3,200*l.* This circumstance was in itself sufficient to excite his attention, and to put him upon inquiry. Satisfaction had been entered upon these judgments in the name of *Denis Browne*, by his attorney, *Richard Livesay*. Now, if the warrant of attorney for entering satisfaction had been called for, it would have been found that it was given in *April* 1819, and if this had been followed up, as it ought to have been, it must have led to a knowledge of the transactions of 1819, and of the substitution of the joint bond and warrant of attorney for the judgments of 1810 and 1812. It would also have been discovered that *Denis Browne* was dead, and the authority of the attorney in consequence revoked, and consequently that no satisfaction could be entered up on the judgments in his name. And his attention would have been more particularly directed to the fact of the death of *Denis Browne*, by the subsequent entry of satisfaction on the judgments against Lord *Oranmore* in 1815, in the name of *Peter Browne*, the acting executor of *Denis Browne*. The Appellant, therefore, had abundant information of circumstances affecting the property, certainly sufficient to induce inquiry, which would have led him to a knowledge of the true facts; and his omission to adopt the ordinary precautions which would have suggested themselves to a prudent man, is proof of culpable negligence, which, according to the authorities, will fix him with constructive notice of the bond and warrant of attorney of 1819.

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But the charge upon the estates being thus established, and its claim to priority over the mortgage to the *Alliance Assurance Company* settled, it is said on their behalf that all the orders of the Court of Chancery made after the final decree in 1845 are irregular, and that the governors of the *Mayo Infirmary* cannot render their priority available, without filing a bill of review to alter that decree. The right of the Respondent having been clearly shown to exist, your Lordships would naturally wish that he should be enabled to assert that right in the shortest and least expensive manner, at the same time that you would feel as in *Champernowne v. Brooke* (*m*), that it would be a dangerous thing to establish a precedent for a departure from the regular course of proceeding, in order to meet the acknowledged justice of an individual case. But I think it may be considered to be competent to the Court of Chancery to deal with the fund as long as it remains in court, or under its authority, by orders such as have been made in the present case, notwithstanding the previous final decree; and this is sanctioned by the decision of Lord *Eldon* in *Gillespie v. Alexander* (*n*). I am satisfied, under the circumstances of this case, that the fund may be looked upon as being still in court. The proceedings in the Incumbered Estates Court seem to have been only auxiliary to those in the Court of Chancery. The decree of *November 1849* having been pronounced, directing a sale of the estates, the Plaintiffs in the suit immediately applied to the Incumbered Estates Court for the purpose of carrying out that decree. And although the commissioner of the Incumbered Estates Court felt himself bound to decide against the claim of priority made on behalf of the *Mayo Infir-*

(*m*) 3 Clark & Fin. 4.

(*n*) 3 Russell, 130; *see also Noble v. Brett*, 24 Beav. 499.

mary, in consequence of the decree of 1849, yet he expressly directed that the payment of the money arising from the sale of the estates should be delayed on their undertaking to apply to Chancery to vary the report on which that decree was founded. This appears to me to bring the fund completely within the power of the Court of Chancery, and to enable that court to determine its application by settling the priorities between the parties. And therefore the orders are, in my opinion, perfectly regular and valid, and ought to be affirmed.

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Lord Cranworth :

My Lords, I arrive at the same result as my noble and learned friend, namely, that there is no foundation for the present appeal. It is unnecessary to repeat the statement of the facts. The first point on which the Appellant relied was, that in truth there was never any trust created for the benefit of the creditor; that there was no trust of which he could avail himself; that this was a mere conveyance in trust for the advantage of the party creating it, to pay a debt due from him for his convenience, but a trust which gave no benefit to the creditor.

Here there was a family settlement, and the whole of the trusts were matter of family arrangement. One of the terms was, that out of the 8,275*l.* to be raised by sale of the estate, the 3,200*l.* due from the father and the son, who concurred in settling the estate, should be paid to the trustee for the infirmary, and that trustee was a party to the deed. I consider this to have been a charge created on the estate by the father and the son, with the privity (if that is necessary) of the trustee and creditor, who was clearly entitled to consider himself as an incumbrancer, at all events after the death of one of the debtors.

The cases in which a debtor conveys his estates, volun-

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tarily, to a trustee, for payment of his debts, whether specified or not, have no application here. In those cases the whole is a mere arrangement for the benefit of the debtor, revocable at his will. In some of those cases it has been held, that if the existence of the trust has been communicated to the creditor, the deed is no longer revocable, *Acton v. Woodgate* (o). Whether that is correct without considerable qualification, I need not here discuss. But here not only was it communicated to the creditor, but he actually was party to and executed the deed. It is true he was party in another right, but I think that that is not material; certainly not material upon the question whether he had notice or not. He had distinct notice of a conveyance on trust which the father and son had agreed on for their common benefit, part of the arrangement being that this debt, to which they were jointly liable, should be a charge on the estate. And it may well be that on the faith of this trust he abstained from entering up judgment on the bond.

My Lords, this case can hardly be distinguished in principle, or indeed in the very facts upon which the principle rests, from that of *Synnot v. Simpson*, in this House (p). There, as here, a conveyance was made of estates, creating, in terms at least, a trust for creditors who were not in that case parties to the deed, and subject to this trust there was a settlement for the mutual benefit of the father and the son. And what your Lordships then held was this, that at all events after the death of one of the parties to that arrangement that trust became an absolute trust, which the creditor, in whose favour it was made, might insist upon being enforced. I am unable to distinguish that case from the present.

(o) 2 Myl. & K. 492.

(p) 5 H. L. Cas. 121.

It was contended in argument at the Bar, that here there could not be any positive trust for the infirmary, inasmuch as there was an absolute power of revocation in *Dominick Geoffrey Browne* and *Dominick Browne* during their joint lives. It is very true that the title of *Denis Browne* to the 3,200 £ as trustee for the infirmary might have been defeated by an exercise of that power, but this does not affect his title except as subject to the power; and when by the death of *Dominick Geoffrey Browne* the exercise of the joint power had become impossible, the right of *Denis Browne* became absolute. I am therefore clearly of opinion, that under the terms of these deeds of *June 1823* an absolute trust was created, at all events after the death of *Dominick Geoffrey Browne*, in favour of the trustee for the infirmary.

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Then the next question is this: It is said that the money, out of which the 3,200 £. were to be paid, was not, according to the trusts of the deeds, to be raised, except on a sale to be made with the consent of the father and the son, or the survivor, and that no such sale has been made. This is a mere fallacy. It is true that no such sale was to be made except by the consent of the father and the son or the survivor; but then, until sale the trustees were to apply the rents in keeping down the interest of the debt, subject to any joint direction of the father and the son, and no such joint direction was ever made. Therefore, till the sale the creditor was secure of his interest, and when a sale should take place, his debt was the first demand on the proceeds, after payment of the costs of sale. The concurrence of the son, who was the survivor, in the mortgage under which the sale has been made, is certainly a consent in writing within the meaning of the first deed.

Then arose this question, as to which I at one time entertained a doubt: Had the Plaintiffs (the mortgagees) notice of this debt, so as to bind them to its discharge?

on the part of the mortgagees, in the view of a Court of Equity, to assume that these five separate judgments, or any of them, were what the deed referred to as the joint judgment against the father and the son for a single sum of 3,200 l. If the mortgagees had taken the obvious precaution of inquiring, either of the representatives of the trustee, or of the officers of the infirmary, the truth must have transpired. Their attention was called to the subject on the very face of the deed. Therefore, this is a case in which, I think, the Court was bound to consider the mortgagees as having constructive, or perhaps I should rather say, express notice of the creditor's claim.

Now, in coming to that conclusion, I must couple my observations with saying, that I do not recede at all from what I am reported to have said in the case of *Ware v. Lord Egmont*, namely, that this doctrine of constructive notice ought not to be extended. But, at the same time, I said that, in my opinion, every purchaser or mortgagee must be considered as having notice, not merely if he might have obtained, but if he ought to have obtained a knowledge of that with which he is to be affected. And I think that this is clearly a case of that kind. The obvious precaution of inquiring at the infirmary was omitted, and I think, therefore, that the mortgagees must be considered to have had notice.

The only remaining question is on the matter of form, whether, after the *Master's* Report and the Decree on further Directions, it was consistent with principle and practice to let in the creditor to insist on the claim under the deed. I think that may be done. The estate, or the money produced by its sale, is in the nature of a fund in Court. The practice in such cases has always been, at least in modern times, to let in all claimants, whatever decree may have been made for its distribution.

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They certainly had notice of it; for the trust deed of 24th June 1823 is expressly mentioned in their mortgage deed. But the argument was, that though it was mentioned, the mortgagees had a right to consider that it had been discharged. It is recited that there is a sum of 3,200 *l.* due to the Right honourable *Denis Browne*, as trustee for the *Mayo Infirmary*, on a Judgment against the said *Dominick Geoffrey Browne* and *Dominick Browne*. The latter, who was the survivor, and was the mortgagor, must be taken to have represented to the mortgagees that this debt had been discharged. This of course did not absolve the mortgagees from the obligation of ascertaining the truth. But what they say is, that on searching the Judgment Rolls it appeared that there was no such judgment debt as that described in the deed. If that had been all, it is clear that the mortgagees would have remained liable. The creditor was in truth a creditor, not by judgment, but by a bond, with a warrant of attorney to confess a judgment, on which, however, no judgment had in fact been entered up. The nature of the debt or rather of the security was described, though not with strict accuracy, but the intended mortgagees had distinct notice of the debt, and of the trust for its discharge. I am clearly of opinion that it would have been what we must call gross negligence in any intending mortgagee or purchaser to be satisfied with merely ascertaining that there was no judgment exactly answering the description of that contained in the deed.

But it was said, that here there was such a judgment, and that the mortgagees procured satisfaction to be duly entered on it. In fact, however, there was no judgment corresponding with the debt as described in the deed. There was no judgment against the father and the son. There were five judgments against the father for sums amounting in all to 4,300 *l.* But, it was gross negligence

on the part of the mortgagees, in the view of a Court of Equity, to assume that these five separate judgments, or any of them, were what the deed referred to as the joint judgment against the father and the son for a single sum of 3,200 £. If the mortgagees had taken the obvious precaution of inquiring, either of the representatives of the trustee, or of the officers of the infirmary, the truth must have transpired. Their attention was called to the subject on the very face of the deed. Therefore, this is a case in which, I think, the Court was bound to consider the mortgagees as having constructive, or perhaps I should rather say, express notice of the creditor's claim.

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This was done in *Gillespie v. Alexander* (q), which appears to me to be a much stronger case than the present, for there the fund was hardly within the meaning of the rule a fund in Court. Tho decree had been made appropriating the fund amongst the several legatees. Many of those legatees to a large amount, above, I think, 10,000 l., were infants and married women, and, for some reason connected with their character, their shares of the fund were retained in Court, and carried to their separate accounts. Now, it has always been considered, that when a fund is carried to a separate account, it is in the strongest possible way appropriated for the benefit of the party to whose account it is so carried; and it is well known, that, in order to get that fund out of Court, the person to whose account it has been carried presents an *ex-parte* petition. It is entirely his own fund, and nobody else is supposed to have any interest in it. But, in that case, Lord *Eldon*, a judge very little inclined to deviate from the strict rules of the Court, held, that, according to the practice of the Court, a prior claimant having come forward, and having established his right, it was competent to the Court to apply the fund in Court rateably with that which had been got out by other parties, in payment, *pro tanto*, of that creditor's debt, leaving him as to that portion which had been got out of Court to apply to the legatees to obtain payment for them. It appears to me that that is a much stronger case than the present, and one upon which your Lordships may very safely act.

There can be no doubt but that relief might be had by a supplemental bill, or by a petition in the nature of a bill of review; but there can be no reason why this unnecessary delay and expense should be occasioned. Complete

justice is done by making the Respondent pay all the additional costs which have been occasioned by the imperfect manner in which the claim was brought forward.

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It was argued that this is not the case of a person who had not come in under the Decree, but afterwards sought to be let in on terms, for here the Respondent, or those for whom he was a trustee, did come in under the Decree, though he omitted to rest his claim on the Deed of 24th *June* 1823. But this makes no difference in principle; and, considering that the infirmary, by *Denis Browne*, as its trustee, was an equitable incumbrancer by virtue of the provisions of the settlements of *June* 1823, and that the Appellants must be considered as having had notice of that incumbrance, I think that the Court did right in admitting the Respondent as the representative of the trustee of the infirmary to establish his priority.

The result therefore is, that the appeal must be dismissed with costs, and the cause remitted back to the Court of Chancery in *Ireland*, with a declaration that the Respondent, as trustee for the infirmary, ought to be charged with all extra costs occasioned by the demand not having been, in the first instance, rested on the title under the deeds of *June* 1823.

I do not think that the pendency of the proceedings in the Encumbered Estates Court affects the rights of the parties. That court has jurisdiction to direct a sale, and to distribute the money, notwithstanding the decree, 12 & 13 *Vict.* c. 77, s. 41. But it has also the power to do what it has done here. [His Lordship read the section.] If it were necessary, it seems to me that that goes the full length of saying, that even if there had not been the general principle, which I think there is, which would enable the Court to treat this as a fund still in Court, that clause in the Act gives distinct jurisdiction so to do. It is plain, from that section, that the Incumbered Estates

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Court, in a case where the rights of the parties had been adjudicated upon, or were in a course of adjudication by the Court of Chancery, was intended to be only ancillary to Chancery; and I think that, whatever the Court of Chancery might have done as to ascertaining priorities, if there had been no proceedings in the Incumbered Estates Court, it may do, notwithstanding those proceedings. This was clearly the opinion of Mr. Commissioner *Longfield*; for though he, having regard to the proceedings in Chancery, refused, and, I think, rightly refused, as the matter was before him, the application of the infirmary, yet he delayed payment, in order to enable the claimant, that is to say, the infirmary, to apply to the Court to vary the report.

The following order was entered on the Journals:—

“It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the said petition and appeal be, and is hereby dismissed this House, and that the said orders, so far as therein complained of, be, and the same are hereby affirmed: And it is farther ordered, That the said Appellant do pay, or cause to be paid to the said Respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And it is declared, That the Respondent, as trustee for the said infirmary, ought to be charged with the extra costs occasioned by the demand not having been, in the first instance, rested on the title under the deeds of the 24th of *June* 1823, in the pleadings mentioned: And it is also farther ordered, That, with this declaration, the cause be remitted back to the Court of Chancery in *Ireland* to do therein as shall be just, and consistent with this declaration and judgment.”

Lords' Journals, 30 *July* 1858.

EMMA SLINGSBY - - - - Appellant.

C. G. GRAINGER and others - - Respondents.

1859.

March 24, 25,
31.

Will.

"The Funds."
Bank Stock.

A Testatrix possessed property in Consols, Reduced Annuities, and in Bank Stock; she made her own will, and she left to her brother "Everything I may be possessed of at my decease, for his life; and should he marry, and have children of his own, to those children after; but should he die a bachelor, I leave the whole of my fortune now standing in the Funds to E. S.":

Held, affirming the judgment of the Court below, that the Bank Stock did not pass to E. S. upon the brother dying a bachelor: *dub.* Lord Chelmsford and Lord Kingsdown.

Miss Catherine For, of Montague-place, by her will, made by herself, and dated 21st February 1837, appointed her brother Edward her executor; and, after bequeathing some pecuniary legacies, and an annuity of 60 l., proceeded as follows: "To my dear brother Edward I leave everything I may be possessed of at my decease for his life; and should he marry, and have children of his own, to those children after. But should he die a bachelor, at his death I leave the whole of my fortune, now standing in the Funds, to Emma Slingsby, my god-daughter. Plate, linen, furniture, books, &c., I leave to my brother Edward for ever; and, after my funeral expenses are paid, and the legacies out of the money he has of mine in his hands, the remainder to be his for ever, and no questions asked what the sum may be." The testatrix died 7th July 1838, possessed of nearly 19,000 l. in Consols and Reduced Annuities, and of 5,833 l. in Bank Stock, and her brother entered into possession of the property. He died a bachelor, 25th December 1854, having appointed the present Respondents executors of his will. On the 3d May 1855, the Respondents filed a bill against the Appellant, praying to have it declared that the sum of 5,833 l. Bank Stock was not included in the bequest to the Appellant.

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At the hearing of the case, on the 7th *March* 1856, Vice-Chancellor *Stuart* made a declaration to that effect, which was, on the 10th *June* following, confirmed by the Lords Justices. This appeal was then brought.

Sir *R. Bethell* and Mr. *Wickins* for the Appellant:

Unless the words, “whole of my fortune now standing in the Funds,” are held to include Bank Stock, there will be an intestacy as to that part of the property, which certainly was never intended by the testatrix: that is a result which courts of equity will do their utmost to prevent. The intention of the testatrix is clear; the will is of her own making, and, being so, the words used in it must be construed according to the meaning given to them by ordinary people, and not according to merely technical rules. The word used here is “Funds,” not “Government Funds,” nor “Public Funds.” In ordinary parlance, “Funds” will include Bank Stock. In the “official list” of “The Funds,” Bank Stock stands the first, and so it does in the lists in the newspapers. The popular meaning of the word is thus shown beyond all doubt, and the testatrix employed it with its popular meaning. It must, therefore, be taken, that “everything I may be possessed of” (which it is conceded would pass this property), and “whole of my fortune now standing in the Funds,” are, in this will, synonymous expressions, and were so intended by her, and her plain intention must have full effect. There is nothing in the cases to prevent these words from receiving their ordinary and popular meaning. The cases in which a restrictive and technical meaning has been adopted, are those where the money was to be invested on trust. The distinction between such cases and one where the property already exists in the particular stock, and has merely to be transferred to a legatee, is

obvious. This consideration, or the peculiar circumstances of each case, will explain these decisions. Thus in *Burnie v. Getting* (a), *Greek Bonds*, though issued under the guarantie of this country, were held not to come within the meaning of the words, "monies in the Funds," but that was because other words in that will showed that they were not meant to be included; but the Vice-Chancellor, *Knight Bruce*, there expressly said, that in other wills the words "Government securities" might possibly include such bonds. In *Trafford v. Boehm* (b), the money was directed to be laid out in "Government investments," and under those special words Bank and *India Stock* were held not to be included. In *Ridge v. Newton* (c), the words, "my *Irish* funded property standing in my name in the Bank of *Ireland*," were held not to include debentures issued under the 28 *Geo. 3*, c. 2, the reason being that debentures were not in any way funded property, though they might, under the special provision of the Act, be made so on the application of the party. Till that was done, they were not "funded property standing in the Bank of *Ireland*." There is no change to be made here, nor any investment upon trust to take place. In this case the words of the will are exactly expressive of what does actually exist. They are the testatrix's fortune "now standing in my name in the Funds." This fortune does stand in her name in the books at the Bank, and her Bank Stock she never doubted was part of her "fortune." *Mangin v. Mangin* (d) is, therefore, precisely in point. There the words were "all the funded property in my name in the Bank of *Ireland*;" and the testator having 3½ per Cents. and *Irish* Bank Stock, the *Master of the Rolls* held that both passed.

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(a) 2 Col. Ch. C. 324.

(b) 3 Atk. 444.

(c) 2 Dru. & War. 239.

(d) 16 Beav. 300.

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Mills v. Mills (e) was relied on in the Court below, but it does not affect this case. There the Vice-Chancellor, said (*f*), "The words, 'Stocks in the Public Funds' would not have passed the Bank Stock;" perhaps so; but here the word is "Funds," not "Public Funds," and the use of the word "Public" would fully justify what was there said, as it gave an undoubted meaning to the other word, and restricted its application.

The plain intention of this will was to give to the Appellant, after the brother's death without children, everything that had been given to him, except only certain perishable articles and money then in his hands, and these things were specially excepted. "No question" was to be asked about them; but all the rest the Appellant was to take. If, therefore, "Bank Stock" should be deemed not strictly to fall within the description of "funded property," then, as the gift is clear, but the description is defective, the case is one in which the Appellant may claim the aid of the doctrine, that *falsa demonstratio non nocet*.

Mr. *Malins* and Mr. *Osborne* for the Executors of the Brother.

There is no rule that Courts of Equity will do their utmost to prevent an intestacy. As to land, the rule is rather the other way, in favour of the heir; and so it is as to personalty in favour of the next of kin.

There is no universal indefeasible gift here. Suppose that the testatrix had sold out her money in the funds, and invested it differently, or suppose the brother had married, in either case the Appellant would have got nothing.

The cases are decisive against the Appellant. In *Rose v.*

(*e*) 7 Sim. 501.

(*f*) Id. 508.

Bartlett (g) it was held, that if a man has lands in fee and lands for years, and devises "all my lands," the fee-simple lands alone will pass; and from that case to the date of the recent Wills Act a particular meaning has always been given to words of this kind. *Chapman v. Hart* (h), and *Thompson v. Lady Lawley*, (i) strongly sustain that mode of interpretation. And though in *Day v. Trig* (j) a devise of "all my freehold houses in Aldersgate-street," where the testator had only leasehold houses, was allowed to pass those leaseholds, it was only because there were no freeholds to satisfy the will; for, had there been any, the leaseholds would not have passed. *Napier v. Napier* (k) proceeded on that principle; and in the final decisions in *Denn v. Roake* (l) the words "all my estates in S.," were held only to pass those which the testatrix held in her own right, and not to pass those over which she had a mere power of appointment, there being no reference in the will to the power, such being the rule of law, and this decision was adopted even though there was no doubt about the intention of the testatrix. *Ridge v. Newton* (m) is conclusive, and must be overruled, or this judgment must be affirmed. It is not to be explained away as attempted on the other side. Lord Chancellor Sugden there gave full effect to the fact, that the debentures when presented and registered would become "funded property," but till they were, they did not fall within that description; and so he held that they did not pass. He acted on the strict rule of interpretation. In *Burnie v. Getting* (n), in like manner, *Greek Bonds*, though issued under the guarantee of *England*, were held not to come within the description of Funds; for in both these

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(g) Cro. Car. 292.

(h) 1 Ves. 271.

(i) 2 Bos. & Pul. 303.

(j) P. Wms. 286.

(k) 1 Sim. 28.

(l) 5 Barn. & Cr. 720;

1 Dow. & Clark, 437.

(m) 2 Dru. & War. 230

(n) 2 Coll. Ch. C. 324.

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cases there was, as there is here, other property which would answer the description in the will. As to the official lists in the newspapers, they prove nothing, or too much, for they include *India Bonds* and *Exchequer Bills* which certainly are not property in the Funds.

Bank Stock never has been considered as "property in the funds;" it is merely the stock of a private company. *Trafford v. Boehm* (o). The 8 & 9 Will. 3, c. 20, shows that that description only applies to the Funds provided for by Parliament for the payment of the National Debt. *Mangin v. Mangin* is either distinguishable, or it cannot be supported. In *Lowe v. Thomas* (p), the gift of "the whole of my money," was held not to pass stock belonging to the testatrix. The authorities therefore are adverse to the Appellant; and there is nothing in the particular devise here to render them inapplicable. There is no gift here of anything which has merely been misdescribed, but was plainly intended to be given, and consequently there is no ground for applying the doctrine that *falsa demonstratio non nocet*.

Sir R. Bethell, in reply:

Denn v. Roake (q) does not apply, for there the testatrix could only affect a certain property by virtue of a power, and her will did not make the slightest reference to that power. The words of the will were "all my estate; and as to part, she had an estate, but had no title to affect that other; she omitted any reference whatever to that which was the foundation of her title to dispose of the second estate, and it would not pass. Even with regard

(o) 3 Atk. 444.

(p) 5 De. G. Macn. & Gord.

315.

(q) 5 Barn. & Cres. 720

1 Dow & Clark, 437.

landed estate, words of description do not always receive a restricted meaning, *Goodtitle v. Southern* (r).

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The Lord Chancellor (Lord *Chelmsford*):

This is one of those cases of construction of a will, in which, depending as it does upon the intention of the testatrix, to be gathered from the language employed, different minds may be easily led to different conclusions. At present, however, there has been an entire uniformity of opinion in those who have been called upon to determine the meaning of the very few words in the present will which require to be construed. Three learned judges have already pronounced their judgments upon the subject, and two at least of my noble and learned friends are prepared to express their unhesitating agreement with them. Under these circumstances, any doubt which I may entertain of the propriety of the construction which has been adopted is of little importance, and can have no influence on the final decision.

Cases have been cited to show that the term "the Funds" has a fixed technical meaning, which prevents its extending to Bank Stock, unless there is a clear indication of intention that that should be included: and there is a concurrence of opinion of so many learned persons that no such intention is to be discovered in this will, that it is impossible for me to rest with any confidence upon any different view which I may have formed. As the case involves no principle of general application, but is confined entirely to the construction of this particular will, and as so many minds agree upon a question where difference is so likely to arise, I feel that it would not be becoming in me to press

(r) 1 Maule & Sel. 299. See *Harrison v. Hyde*, 4 Hurl. & Norm. 807.

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any doubts upon your Lordships' attention, but that I ought to yield to the judgment of my noble and learned friends that the Decree should be affirmed.

Lord *Cranworth* :

My Lords, I think that the decree of the Court below ought to be affirmed. In all cases upon the construction of wills there must always be room for some doubt; but I arrive at this conclusion upon grounds which appear to me to be satisfactory.

In the first place, I think the words "the Funds" must be taken to mean the same as the "Government Funds" or "Public Funds." There is no other interpretation which can be put upon the term that would not lead in every species of property that the imagination might suggest. Suppose the words had been "the Public Funds," or "the Government Funds;" what is the meaning of those words? Do they or do they not include Bank Stock? I think clearly the legitimate meaning of the expression "the Public Funds," is that portion of the public debt which is paid out of the funds appropriated to that purpose by Parliament. Originally we know, as matter of history, that particular funds were appropriated to particular debts, but afterwards they were all consolidated together, and made one fund; and the term "the Funds" has ever since, for a century at least, been taken to mean that portion of the public debt which is payable out of the Consolidated Fund.

But then it is said that, though that is the legitimate meaning, the legal meaning of that expression, that is not the way in which the expression is used popularly, for popularly it is taken to mean something that would include Bank Stock. Now, upon that subject I confess that no argument has been addressed which to my mind is at all

satisfactory. Sir *Richard Bethell* put in, I will not say as proof of that, but as evidence in some degree that that was a fair mode of dealing with the subject, the public newspapers, which, under the head of intelligence of the market prices of the day of the Public Funds, includes Bank Stock. But that argument (as was pointed out) goes a great deal too far, because it includes also *India* Stock and Exchequer Bills. Besides, I think the argument is altogether much too slight for us to build upon in considering what is the interpretation to be put upon the words; for I observe that, under the head "Court Circular," there is always given an account of anybody who has been, for example, upon a deputation to the Admiralty; you could not say that that was connected with the Court for that reason. And there are many other similar observations, which no doubt present themselves upon looking minutely through the newspapers.

That being so, the question is, whether there is anything in the context of the will to show that here the words "my fortune now standing in the Funds" have any other than their natural, legal, and primary meaning. It is said, first, that in the event of the brother having married and having had children, the Bank Stock would have passed to him, and so it would, because in that case the testatrix gives over everything she may be possessed of at her decease, and of course that would have included the Bank Stock. And the suggestion is, that the alternative being of the brother marrying and having children on the one hand, or of his dying a bachelor on the other, it is reasonable to suppose that what was given to him, and his children after him, if he married, must be the same that was given to the god-daughter absolutely if the brother died a bachelor. Now, I do not think that is a fair argument, more particularly when I observe that the testatrix has used different words: instead

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of saying, "I leave everything that I may be possessed at my death," the expression is, "I leave my fortune standing in the Funds." It would seem, therefore, she meant something different, because she has expressed it differently. At all events, I do not think it is a necessary conclusion that she meant her god-daughter to have everything that she clearly intended her brother to have he married, and had children.

The portion of the argument which has had most weight with me, is that which is founded upon the principle of *demonstratio non nocet*; that it might be taken that she given the whole of her fortune, and that the expression "now standing in the Funds," was merely a *falsa demonstratio*, for that it was not all "standing in the Funds." Lords, I certainly should have entirely acceded to this once if the expression, "my fortune," had not been connected with "now standing in the Funds" as to make the latter a part of the description of the former. If it had been, I wish to dispose of the whole of my fortune to my niece, which fortune is now standing in the Funds, I should have taken to be a mere *falsa demonstratio* which would not have affected the generality of the first. And that is exactly in conformity with the case which is cited by Sir *Richard Bethell*, which I believe has sometimes been doubted, though I think without sufficient ground; for I think it was quite rightly decided. I allude to the case of *Goodtitle v. Southern* (s), where the testator devised "all that my farm, called *Troques Farm*, now in the occupation of *A. C.*" It turned out that there were two closes of land, constituting part of the *Troques Farm* which were not in the occupation of *A. C.*, and the question was, whether they passed; and the jury having found

(s) 1 Maule & Sel. 299.

they were part of the *Troques* Farm, the Court held that they passed, because that which was given was clearly the *Troques* Farm. There was no doubt that it was the *Troques* Farm which was devised by the will. It was wrong to say that the whole was in the occupation of A. C.; but the circumstance that the testator had made a mistake in supposing that the whole was in the occupation of A. C.; did not vitiate the gift. But if it had been, I give all those lands at *Troques farm* (if there was such a place) in the occupation of A. C., it seems to me quite clear that any portion of the land which was not in the occupation of A. C. would not have passed.

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The distinction is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the description of the thing given. I think that in this case it is impossible to say that the testatrix meant to give the whole of her fortune, for she has merely said, "the whole of my fortune now standing in the Funds." On these grounds, I think that the Judgment below was right, and ought to be affirmed.

Lord *Wensleydale*:

My Lords, I have no hesitation in concurring in the advice now given to your Lordships, that you should affirm the decree of the Lords Justices.

If we apply the rules now firmly established for the construction of wills and all other written instruments, I must own that it appears to me that there is no reasonable doubt in this case. I have often had occasion, particularly in the cases of *Gray v. Pearson* (t), and *Abbott v.*

(t) 6 H. L. Cas. 106.

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Middleton (u), to call your Lordships' attention to the paramount importance of adhering to these rules. Our duty is to ascertain not what the testator may be supposed to have intended, but the meaning of the words he has used, and these we must construe according to their ordinary and grammatical sense, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be collected from the whole instrument, followed from it, or, it may be added, some inconsistency with the subject on which the will is meant to operate, and then the sense might be modified so as to avoid those consequences, but no farther. It is vastly more important to attend to these rules than to look out for our guides to previous decisions on the construction of similar instruments, and to compare them. Doubtless we are bound by decided cases for the sake of obtaining as much certainty in the administration of the law as the subject is capable of. But when the decision is not upon some rule or principle of law, but upon the meaning of words in instruments which differ so much from each other, and when the proper construction is so varied by the particular circumstances of each case, it seldom happens that the words of one will form any guide for the construction of words resembling them in another. And besides, the important rule I have mentioned has not always been properly applied, and thus the cases are of no authority at all.

It is the practice, however, to cite numerous cases of the employment of similar words in other wills, very often conducing to no useful purpose, and leading to a great waste of time. In this case I may I think say that no light is to be derived from any of the cases cited, and I think it unnecessary to comment on them.

(u) Ante p. 68. 115.

The words to be considered in the will are, "the whole of my fortune now standing in the Funds." Surely there can be no doubt that the words "the Funds" have, in ordinary parlance, but one meaning. "The Funds" standing alone and without context, mean the funds provided by various Acts of Parliament for the payment of the annuities granted by the Government, and forming part of the National Debt. The statute 8 & 9 W. 3, c. 20, throws a light upon this subject: it recites that several persons had lent sums of money at the receipt of the Exchequer, upon the security of the aids, revenues, and *funds* therein-after mentioned, and provides for the deficiency. Money in the Funds is a portion of the sums lent on the security of the Public Funds granted by Parliament: in that sense, therefore, the words "fortune in the Funds" must be read. And nothing but Government Annuities will pass unless the context or the state of things to which the will relates calls upon us to put a different construction on the words.

If, indeed, the testator at the time of making the will which contains a bequest of what she then had in the Funds, had no Government Annuities at that time, it would have been competent, in order to render the will operative to construe the words "Funds" in a secondary sense, and possibly a sum in Bank Stock might have passed. Bank Stock is nothing but a proportional share of the general profits of a corporation belonging to an individual, and not any part of the public funds on which its capital is laid out. Those belong to the corporation which, in point of law, is wholly distinct from its members. It is quite unnecessary to decide whether Bank Stock would pass in such a case in order to render the bequest operative. For nothing is more clear than that there being a large sum of money in the Funds, in the proper sense of the words, to

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satisfy the bequest, and make it operative, you cannot include more.

Is there anything in the context of the will to call upon us to depart from the ordinary sense of the words, "the Funds"?

It is contended that the testatrix must have meant the Appellant, in the event of her brother *Edward* dying without issue, to take all that his children would have taken under the previous devise to him; and therefore that the words "the whole of my fortune now standing in the Funds" must be considered as equivalent to the whole of her fortune which she had previously left to her brother. If we may speculate on what the testatrix may probably have intended to say, we should possibly be right in conjecturing that she meant the whole of her fortune (with the exception of the small legacies specifically mentioned), to be enjoyed by the Appellant in the event of the testatrix's brother dying a bachelor. But she has not said so. She has left to him everything she may be possessed of at her decease for his life, and should he die a bachelor, then not the whole she shall be possessed of, but "the whole of my fortune *now* standing in the Funds," making a distinction between that and the whole of her property.

I think it impossible to construe this bequest of "all my fortune," and the addition "now in the Funds," as a *falsa demonstratio*, as it would probably have been a bequest of all my fortune distinctly, with an addition such as this, "and that fortune is now in the Funds." As it is, it clearly comprehends *part* only of the whole property which she had left to her brother, and that part her fortune now in the Funds. This bequest passed that sum only which stood in her name at the date of her will in the Funds, properly so called. The Bank Stock, therefore, does not

pass. And the circumstance that in the event of her not having disposed of her Bank Stock in her life, she would die intestate as to that part, cannot have the effect of causing it to pass under words not properly descriptive of it ; and no case has been cited to show that it could. She certainly, in the events that have happened, did die intestate as to the Bank Stock, for the word "remainder" in the last part of the will clearly means only the remainder of the money in hand. I am therefore clearly of opinion that your Lordships ought to affirm the Decree.

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Lord Kingsdown :

My Lords, it is not without much hesitation and great reluctance that I have arrived at the conclusion, that the Decree in this case must be affirmed ; for I have little doubt that in affirming it we are depriving the Appellant of a benefit which the testatrix intended her to take, and I have some doubt whether the language of the will is not such as to warrant a court of justice in carrying that intention into effect.

I consider it to have been long settled that Bank Stock is not accurately described as stock in the Public Funds, and that it will not pass under such a bequest in a will when there is property strictly answering the description, unless there be something in the context of the will to give a more extended meaning to the term. Nor do I think that in this will any other meaning can be given to the term "the Funds" than it would bear if the expression had been "the Public Funds."

But it is a familiar rule of construction, that in interpreting wills the import of particular expressions may be restricted or enlarged by the context of the instrument, and that a court of justice must read the language used in the sense in which it appears that the testator used it. For

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this purpose the Court is not only authorised, but is bound to place itself as far as possible in the situation of the testator when the will was made, and to expound the bequests which are contained in it by the light afforded by the surrounding circumstances.

Now it appears in this case that the bulk of the testatrix's property consisted of stock in the Public Funds, properly so called, and of Bank Stock, both standing in her own name in the Bank books, and that she had no other property of any kind producing income; that her brother was in the habit of receiving the income arising from those funds which would all be paid by the Bank of *England*, though in different characters, the dividends on the Public Funds being paid by the Bank as agents for the Government, and the dividends on the Bank Stock as a share of their own profits. It farther appears, that the testatrix's brother acted as her banker, and in this character had monies of hers in his hands, and that this balance, with her plate, linen, furniture, and articles of a similar description, constituted the whole remainder of her property.

In this state of things she makes her will, and, after giving certain legacies, she bequeaths "everything that she may be possessed of at her decease" to her brother for his life, and, should he marry, and have children of his own, to those children after." And she then proceeds to provide for the event of his dying a bachelor; in which case she leaves the whole of her "fortune now standing in the Funds" to her god-daughter, the Appellant. She then makes a gift to her brother absolutely of all the monies belonging to her in his hands, after payment of her funeral expenses and legacies, and gives him also all her plate, linen, furniture, &c. &c.; that is, she gives to him absolutely the whole of her property, as it existed at the

date of her will, except that which was invested in the manner already described.

The bequest to the brother for life is, therefore, inaccurately worded. The testatrix did not mean to settle all that she might die possessed of, but merely her stock, Government Stock, and Bank Stock, as is clear by the effect of the subsequent gifts to the brother absolutely. The same observation, of course, applies to the subsequent bequest to his children. When the testatrix, in the next clause, makes a bequest to her god-daughter, it is difficult to resist the impression, that she intended, by the words "all my fortune," the same thing which, in the preceding gift, she had described as "all that I may be possessed of at my death," but that it occurred to her that neither form of words described accurately the subject of the bequest, inasmuch as she was, in the very next sentence, about to give to her brother absolutely everything she had except the stocks standing in her name. And that she, therefore, introduced the succeeding words as limiting the generality of the bequest; that she intended, in short, not in a particular event to make a specific bequest of sums of stock then standing in her name, but to reconcile the bequests in her will by distinguishing between the property which was in a state of investment, and was intended to be settled, and that which, in the immediately succeeding words, she gives to her brother absolutely.

At the same time, it is impossible to deny that this construction does some violence to the language of the will; that it is difficult to mould the expressions used so as to give effect to the supposed intentions; and that it requires the Court, contrary to its ordinary rules of interpretation, to say, that the testatrix, in the same instrument,

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meant the same thing by words in their ordinary meaning essentially different.

Two courts, the *Vice-Chancellor* and the Lords Justices with every disposition to adopt, if possible, this construction, have held it to be inadmissible. Two of the noble and learned Lords, who have heard this case are strong of the same opinion. In order to advise the reversal of a judgment, I apprehend it is not sufficient that your Lordships should doubt whether it is right; you must entertain a reasonable assurance that it is wrong. I cannot myself, in this case, feel such an assurance; and I concur, therefore, though very unwillingly, in the opinion that the appeal must be dismissed, but I think without costs. Decree and Order affirmed (without costs).

Lords' Journals, 31 March, 1859.

RICHARD HOARE and others - - *Appellants.*

HENRY DRESSER, J. NORRBOM - *Respondents*

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March 14, 15,
17, 18, 21.

Principal
and Agent.
Bills of
Lading,
Acceptances.
Lien.
Cargoes.
Appropriation.

If there has been an engagement to appropriate to a certain individual a particular cargo, or a particular part of a larger cargo, for example, "one hundred quarters of wheat out of five hundred quarters which I have now sent," in either of these cases we will interfere to enforce performance of the engagement, though the person who has made an engagement to sell a certain quantity of property, may be shown to possess such a quantity of that property, equity will not treat the property so possessed as available for the engagement.

The agent and manager of the business of a *London* firm who in *Sweden*, gave to a merchant there about to draw bills from the firm an assurance that the bills would be accepted; when bills of lading of cargoes of timber were transmitted to the *London* firm and bills of exchange were drawn against them:

Held, that this assurance, though thus made and acted on, was not binding as between the *London* firm and the foreign merchants to

as equivalent to an acceptance of the bills, so as to vest in the *London* firm legal rights from the time of such assurance given.

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I., a timber merchant in *Sweden*, had dealings with *D.*, a merchant in *London*, and sent him cargoes of timber, which *D.* disposed of on a *del credere* commission, and in respect of which *N.* drew bills on *D.* In *September* 1853 the accounts between them were unsettled, but *D.* claimed a considerable balance as due to himself. On the 29th *September* *N.* wrote to say that he expected bills of lading from two captains (whom he named), and that he had drawn for a certain amount on *D.* On the 24th *October* *H. & Co.*, merchants in *London*, received through *K.*, their agent, and the manager of their business in *Sweden*, a letter from *N.*, in which he enclosed a letter to *D.*, whereby he drew on *D.* for 1,312*l.*, which he claimed as due to himself from *D.* In the letter to *H. & Co.*, *N.* desired that this enclosure might be handed to *D.*; and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that *N.* had duly delivered all the cargoes of timber contracted for between them, except one, particularly named, that then *H. & Co.* were to hand to *D.* the three bills of lading of three ships, also named; but if he would not accept the draft, nor give the required acknowledgment, then *H. & Co.* were to insure the cargoes, and sell them; and *N.* drew on *H. & Co.* drafts to the amount of 1,300*l.* This letter was read to *D.*, who hesitated to accept the draft for 1,312*l.*, declaring that he was largely in advance to *N.* It was left in his bill-box for acceptance on the morning of the 24th *October*, and a formal letter, demanding compliance with the conditions of *N.*, was written to him by *H. & Co.* In the course of the same day *D.* wrote to *H. & Co.*, requesting the loan of the bills of lading, saying, "We will return them to you, if from any cause we do not accept the bill for 1,312*l.*" They were sent to him. On the same day, but after *D.*'s request had been complied with, *H. & Co.* accepted the first of *N.*'s drafts, and wrote to him that they would "give protection" to all. On the morning of the 25th *October* a clerk of *H. & Co.* learned at *D.*'s counting-house that the draft for 1,312*l.* had not been accepted; but in the middle of that day it was sent to *H. & Co.* accepted. *D.*, however, refused to give up the bills of lading, and, on the advice of a solicitor (obtained before he had accepted the draft for 1,312*l.*), attached the goods in the hands of *H. & Co.* They brought an action against him to recover the bills of lading, and he filed a bill to stay the action:

Held, that he had not such equitable right on account of anything occurring before the 24th *October* as would prevail against the legal rights which *H. & Co.* acquired on that day.

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THIS was an appeal against a decretal order of the Lords Justices, by which they varied a decree of the Vice-Chancellor, *Kindersley*, made in favour of the Appellants.

The Appellants are merchants, carrying on business in *London*, under the firm of *Hoare, Buxton & Co.* The Respondent *Dresser* is also a merchant, carrying on business in *London*, under the name of *Henry Dresser & Co.* The other Respondent, *Norrbom*, is a timber merchant in *Sweden*.

In *November* 1852, a correspondence was opened between *Norrbom* and *Dresser*, by which *Dresser* undertook to sell, on a *del credere* commission, for *Norrbom*, 2,000 loads of fir timber, at 60s. a load, to be shipped from *Sweden*. *Dresser*, in pursuance of this commission, in the months of *December* 1852 and *March* 1853, entered into contracts for the sale of upwards of 1,500 loads of timber, 500 loads for *Bristol*, the rest for *Gloucester* and *London*. There was some delay in sending the cargoes of timber, of which *Dresser* complained to *Norrbom*; but, on the 30th *June* 1853, *Norrbom* wrote to *Dresser*, stating, that he had received two charter parties for two of the cargoes, and hoped to get one for the third; and requesting, as the three cargoes were forthcoming, and would have to be paid for by the end of *July*, that *Dresser* would give him authority to draw on them for 1,000 l. at ninety days' date. *Dresser*, in reply to this letter, on the 19th *July* 1853, consented to *Norrbom's* drawing upon him as requested. *Norrbom* accordingly, on the 4th of *August*, advised *Dresser*, that he had that day ordered Mr. *Frestadius* to draw on *Dresser* for his account 500 l., at ninety days' date; and he also enclosed to *Dresser* copies of two charter parties of two vessels, called the *Verene* and the *Christiana*, in which two vessels the cargoes of timber for

Bristol and for *London* were afterwards shipped. The bill for 500 *l.* was accepted by *Dresser*, and paid at maturity. On the 24th *August* 1853, *Dresser* wrote to *Norrbom*, complaining of his conduct, and saying, "We have sold the goods delivered for your account, and as we are answerable for their delivery, we have only to request you to arrange so that the sold cargoes be shipped as soon as possible this year; in contrary case, and although, with the greatest efforts, we have succeeded to silence the buyers for the present moment, we anticipate great difficulties, together with lawsuits and damages." On the 6th *September* 1853, *Norrbom* wrote to *Dresser*, that, in consequence of the consent granted him in the letter of the 19th *July*, and as the 500 *l.* already drawn would go against a cargo to *Littlehampton*, he had requested *Frestadius* to draw upon *Dresser* for his account 500 *l.*, at ninety days. This bill for 500 *l.* was also accepted, and when due, paid by *Dresser*. On the 29th *September* 1853, *Norrbom* wrote to *Dresser*, stating that he expected to receive by the next post the bills of lading of the *Verene* and the *Christiana*, and that the captains of two other vessels would complete their loading next week, and that in a few posts he would send the shipping documents of all the four cargoes: and he added, "As an advance of the freight to these captains, I have been compelled to request *Frestadius* to draw upon you for my account for 200 *l.*, at ninety days, which I request you to honour to my debit." This bill for 200 *l.* was not accepted by *Dresser*. No cargo of timber was shipped for *Gloucester*. The shipping documents, in respect of the two cargoes of timber by the *Verene* and the *Christiana* were not sent to *Dresser*, but were forwarded to the Appellants, *Hoare, Buxton & Co.*

On the 22d *October* 1853, the Appellants received from Mr. *Frestadius*, one of their correspondents in *Sweden*, a

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letter, which was in the *Swedish* language, and in the following terms:—

“Messrs. *Hoare, Buxton & Co., London.*

“*Stockholm, 14th October 1853.*

“I beg to refer to my last respects of the 12th instant, in which I advise my draft of 300 *l.*, and I have now to advise that I this day, according to the order of Mr. *Joh. Norrbom*, of *Hernosand*, have drawn on you 1,300 *l.* at 90^d/_d, in the following bills, which I beg you will accept to the said friend's debit.

“100 *l.* to the order of *W. & L. Robinson.*

220 *l.* „ „ *S. A. Edman.*

980 *l.* „ „ *Th. Engstrom.*

1,300 *l.* sterling.

“Advice letter of these drafts from Mr. *Norrbom* is forwarded to Mr. *Kleman*, who has promised to forward it to you, and write thereabouts.—*A. W. Frestadius.*”

On the morning of the 24th *October 1853*, the Appellants received from Mr. *Kleman*, at that time their agent, and the manager of their business in *Sweden*, the following letter:—

“*Stockholm, 17th October 1853.*

“Enclosed you will find a letter from Mr. *J. Norrbom*, of *Hernosand*, with documents of wood shipments on account of Messrs. *Henry Dresser & Co.*, and a draft on them for 1,312 *l.* 1 *s.* 9 *d.*, against which he has authorised Mr. *A. W. Frestadius* to draw upon you at 90^d/_d for 1,300 *l.*, and knowing *Dresser & Co.* to be very good, I have not hesitated to assure Mr. *Frestadius* that you will promptly honour his draft to Mr. *Norrbom*'s debit, and remain.”

The letter from *Norrbom*, mentioned in the above as being enclosed, was in the *Swedish* language. The following was given in the printed papers, as a translation of it :—

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“ Messrs. *Hoare, Buxton & Co., London.*

“ *Hernosand, 6th October 1853.*

“ I am indebted to our mutual friend, Mr. C. G. H. *Scherman*, of *Sundswall*, for your address ; I now take the liberty to hand you a letter of which please to take notice, and to hand, when sealed, to Messrs. *Hy. Dresser & Co.* I also enclose my first of exchange, 1,312 *l.* 1 *s.* 9 *d.*, three *m/d*, last, this firm, with which please to do the needful, to my credit. After having accepted this bill, and acknowledged the correctness of the annexed account current, and given their written acknowledgment that I have delivered to them all the cargoes of wood sold or contracted for to them, except one per *Ingeborg Anna*, Captain *Neilson*, now loading, you will please to deliver to them the enclosed three bills of lading of timber and deals per ships *Verene*, Captain *J. A. Jacobson*, per the *Christiane*, Captain *C. Kjerulf* and the brig *Solide*, Captain *M. C. Prahm*, and also the enclosed two charter parties per the *Christiane* et per the *Verene*. If, contrary to expectation, Messrs. *Dresser & Co.* should dishonour the bill, or not be willing to give the requested acknowledgment, that all the cargoes contracted for and sold to them have been delivered, I request you to protest against them, to insure the cargoes, or dispose of them in the best way for my account, convinced that they, being superior, will realise a net produce far above the invoice amount. Several of my friends have told me that I must be very cautious in my dealings with *D. & Co.*, otherwise I would be exposed to much inconvenience and law suits, and, for this reason,

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I have been obliged to apply to you in this business hoping to be able to render you any service in future. There against, I have authorised my *Stockholm* friend Mr. A. W. *Frestadius*, to draw on you 1,300 *l.* ninety $\frac{4}{10}$ which I beg you will honour to my debit. If, according to what has been mentioned above, you should effect insurance on these three cargoes, I request you to observe if any of the vessels has passed the *Sound*, and, in such case insure only from there. Having some cargoes of timber of first quality ready for shipment at *Hudikswal* I beg you will inform me by return of mail about the highest price these would sell f. o. b. in London, to be shipped as soon as the season opens next year, it being impossible to find ship-room for them before the close of this season. Awaiting your communication, I am, Sir, your obedient servant, (signed) "*Joh. Norrbom*."

The last two letters came to the hands of Messrs. *Hoare Buxton & Co.* on the morning of the 24th day of *October* 1853, and not before.

Upon the receipt of *Norrbom's* letter, which contained the bills of lading of the cargoes and the draft and account current mentioned in the letter, Mr. *Carl Henrick Julius Matton*, a clerk in the employ of *Hoare & Co.*, called upon *Dresser* with *Norrbom's* letter, and with the draft and other documents, and also with the letter therein mentioned, as having been addressed by *Norrbom* to *Dresser*. This letter *Matton* handed to *Dresser*, together with the invoices of the three cargoes therein mentioned, and read or translated to *Dresser* *Norrbom's* letter, and particularly that part of it which related to the instructions given by *Norrbom* to the Appellants. *Dresser* thereupon appeared annoyed at the bills of lading of the three cargoes being sent by *Norrbom* to *Hoare & Co.*, as his agent

seemed unwilling to accept the draft drawn by *Norrbom*, asserting that he had already advanced money on the cargoes, but said he should not give a positive answer until he had examined the documents. *Dresser's* clerk said the affair was "a regular swindle." *Matton* put the bill for 1,312 *l.* 1 *s.* 9 *d.* into the box marked "Bills for acceptance," in *Dresser's* counting-house, and said he would write in a formal manner, repeating the conditions contained in *Norrbom's* letter of instructions. On his return to the Appellant's counting-house, he wrote the following letter on the part of the Appellants to *Dresser & Co* :

"We beg herewith to had you an account current and a letter, together with a bill 1,312 *l.* 1 *s.* 9 *d.*, 3 $\frac{m}{d}$ on your good selves, just received from Mr. *Joh. Norrbom*, of *Hernosand*, with bills of lading of cargoes per *Verene*, Captain *Jacobson*, for *Bristol*; *Christiane*, Captain *C. Kjerulf*, for *London*; and *Solide*, Captain *Prahm*, for *Sturcross Bay*, and charter parties, per *Christiane* and *Verene*, and to inform you that Mr. *Norrbom* has instructed us to deliver to you these documents on receiving your acceptance to the before-mentioned draft, your acknowledgment of the correctness of his account current, and your admission that Mr. *Norrbom* has delivered all cargoes sold and contracted for, through you, except that per *Ingeborg Anna*, which vessel was at *Hernosand*, loading, when Mr. *Norrbom* wrote. As we have received instructions from Mr. *Norrbom* to cover insurance on these cargoes should you refuse to comply with these conditions, we should feel obliged by receiving your decision in the matter at as early a moment as possible.—*Hoare, Buxton & Co.*"

This letter was sent out from *Hoare & Co.*'s counting-house for delivery, with other letters, at about half-past eleven, A. M., and was delivered at *Dresser & Co.*'s counting-house between twelve and two o'clock on the 24th day of

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October 1853. Later, in the afternoon of the same day, and after he had received the letter from Messrs. *Hoare*, & Co., *Dresser* wrote them the following letter :

“ We shall be much obliged by your lending us the bills of lading, charters, and specifications, for the cargoes shipped by Mr. *Norrbom* at *Hernosand*, and we will return them to you if from any cause we do not accept the bill for 1,312 *l.* 1 *s.* 9 *d.* We cannot examine the invoices without the above documents. If you indorse the particulars of the papers lent us on the back of this letter, our clerk will sign it.—*Henry Dresser & Co.*”

This letter was delivered by a clerk of *Dresser* at the counting-house of *Hoare & Co.*, in the afternoon of the 24th *October* 1853, and (as they alleged) upon receipt thereof, and on the faith that *Dresser* would adhere to the terms prescribed in *Norrbom*’s letter of instructions, *Hoare & Co.* delivered to their clerk these several documents, as requested by his said letter, and took the following receipt, signed by the clerk :

“ Particulars of papers delivered to Messrs. *Dresser & Co.*, 24th *Octr.* 1853. Bills of lading, charter-party, specification, per *Solide* ; charter-party, bill of lading, per *Christiane* ; bill of lading, charter-party, specification, per *Verene*. *Rainal*’s and Co.’s letter to Mr. *Norrbom*. Received the above documents.

“ For *Henry Dresser & Co.*, per
 (signed) “ *J. W. Buckland.*”

In the course of the same 24th *October* the bill men — tioned in *Frestadius*’ letter of the 14th *October*, for 980 *l.* — , was left for acceptance at *Hoare & Co.*’s counting-house, in the usual course of business, and they accepted it in due course on the morning of the 25th *October*, and at about

At 1 o'clock in the morning; the bill was taken away the next day.

On the same 24th *October*, *Hoare & Co.* also wrote to *Frestadius* the following letter: "We also give your drafts due protection: 100*l.* *W. and L. Robinson*; 220*l.* *J. A. Edman*; 980*l.* *Thos. Engstrom*. To the debit of Mr. *Norrbom*, of *Hernosand*."

On the morning of the 25th *October* a clerk of theirs called at *Dresser's* counting house, and was told that the bill for 1,312*l.* 1*s.* 9*d.* had not been accepted; but shortly afterwards, on the same morning, one of *Dresser's* clerks left it, accepted, at *Hoare & Co.'s*, but did not return the papers lent by them to *Dresser*.

On this, *Hoare & Co.* wrote to *Dresser* the following letter:

"One of your clerks has just left your acceptance to Mr. *Norrbom's* draft at our office; but as you are aware from our letter of yesterday, several other conditions remain still to be fulfilled before we can consent to leave the documents of the three cargoes, per *Verene*, *Christiane*, and *Solide*, in your hands. Please, therefore, let us know by bearer if you are prepared to fulfil all the conditions prescribed by Mr. *Norrbom*, or if we shall send the acceptance to be exchanged against the documents in question."

This letter was answered on the same day by *Dresser*, as follows:

"We are favoured with yours of this day. When your clerk called upon us yesterday, he did not name the stipulations you write us about; and, indeed, such are quite inconsistent with Mr. *Norrbom's* letter to us, which came through you with the invoices. Mr. *Norrbom* states in his letter that he has another cargo for us lying ready for

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shipment, while you ask us to acknowledge that all the cargoes have been delivered except the *Ingeborg Anna* for *Littlehampton*. As Mr. *Norrbom* owes us a considerable sum, we have ordered proceedings against him for the same.

“Your letter of yesterday was not received till after the documents were handed to us, and we were not then aware of any stipulations.—*H. D. & Co.*”

Later on the same 25th *October*, *Richard Hoare*, one of the Appellants, called on *Dresser*, and had an interview with him at his counting-house, and requested that the documents so lent to him as aforesaid might be returned on his acceptance being cancelled, but *Dresser* refused to deliver up the same.

It afterwards appeared that previously to accepting the bill for 1,312*l.* 1*s.* 9*d.*, *Dresser* consulted with a solicitor, as to the course to be pursued by him with reference thereto, and that he was advised to accept the bill, with a view to attaching the proceeds in the hands of *Hoare & Co.*, but his intention was not communicated to them, nor were they aware of it until at a late hour of the day they received notice of attachment, which was not until after they had parted with the bill for 980*l.*, and after they had written to *Frestadius* their letter of the 24th *October* 1853, promising to protect his three drafts.

On the same 25th *October*, *Dresser* brought an action in the *Lord Mayor's Court* against *Johann Norrbom*, and an attachment was laid of all monies of the said *Johann Norrbom* in the hands of *Hoare & Co.*; this action was not farther proceeded with, but, on the 3d of *November*, and again on the 29th of *November* 1853 respectively, actions were brought in the *Lord Mayor's Court* by *Dresser* against the Appellants, and fresh attachments issued

thereon, which were still depending at the date of this appeal.

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On the 26th *October*, *Dresser* wrote to *Hoare & Co.* a letter, giving his account of the interview of the 24th, with which *Hoare & Co.* did not at all agree, and it formed the subject of contradictory affidavits in the Court of Chancery.

Upon application being made to *Dresser* for the purpose after the commencement of the dispute, he furnished *Hoare & Co.* with a copy of *Norrbom's* letter to him, the original of which had been handed by them to him on the 24th (a).

(a) That letter was in the following terms :—

Messrs. *Henry Dresser & Co., London.*

Hernosand, 6th October 1858.

“ Referring to my respects of the 29th ult., I have herewith the pleasure of handing you invoices of timber and deals,

Per <i>Verene,</i>	Capt. <i>F. N. Jacobson</i>	-	879	17	3
„ <i>Christiane,</i>	Capt. <i>C. Kjerulf.</i>	-	732	6	11
„ <i>Solide,</i>	Capt. <i>C. Prahm</i>	-	401	9	7

“ For which I request to be credited with £.2,013 13 9

“ When from this are deducted

Mr. *A. W. Frestadius*, of *Stockholm*, drafts of 13th *September*

3 $\frac{1}{4}$ on my account - - - 500 0 0

“ Do. do 4th *October* 200 0 0

“ 20 days interest on 500 *l.* - 1 12 0

701 12 0

Remains - - £.1,312 1 9

for which amount I have to day taken the liberty to pass my draft at 3 $\frac{1}{4}$ on you of Messieurs *Hoare, Buxton*, and Company, and request you will duly protect this draft for 1,312*l.* 1*s.* 9*d.*, whereby this transaction is balanced to a point.

“ Captain *Neilson* with the brig *Ingeborg Anna* will not be loaded until next week, when I shall wait upon you with shipping documents, and calculate then against this cargo the five hundred pounds drawn on the 9th *August* through Mr. *Frestadius*.

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Upon receipt of *Dresser's* letter of the 26th *October* 1853, *Hoare & Co.* instructed their solicitors to write to him, requesting that the bills of lading and other documents delivered and lent to him should be returned, upon his acceptance being cancelled. This was done on the 28th *October*, on which the state of things then existing was succinctly explained.

In answer to the solicitor's letter, *Dresser*, on 29th *October*, wrote, saying :

"In accepting the draft for 1,312*l.* 1*s.* 9*d.*, we have already done all that Mr. *Norrbom* requires in his advice to us, and much more than he was entitled to require either by himself for his agents. Under these circumstances, we must decline to return the shipping documents, which are our property."

On the 31st *October* and 4th *November*, the remaining two bills of exchange mentioned in the letter of *Frestadius* of the 14th *October* 1853, namely, one bill for 220*l.* in favour of *S. A. Edman*, another bill for 100*l.* in favour of *W. and L. Robinson* were respectively left at *Hoare & Co.'s* counting-house for acceptance in the usual

"The cargo ordered for *Gloucester* is still left here, and shall be shipped, should I succeed in taking up a vessel, of which all hopes are not over yet ; but whether I succeed in getting a ship for this cargo or not, I request you will give me an admission that all cargoes ordered have been delivered with the exception of that per *Ingeborg Anna* for *Littlehampton*, and of which you will shortly receive the bill of lading. All the cargoes are remarkably good, and I have been offered by an *English* agent who saw them during the loading, 33*s.* per load timber, and 7*l.* standard deals, if I could have sold them.

(Signed) *Joh. Norrbom.*

"*P.S.*—After having written the above, and just as the mail is going to depart, Captain *Prahm* is come, and has taken 49*l.* in advance on his freight, which I will charge in my next, when the bill of lading per *Ingeborg Anna* is sent in."

way, and were accepted by them in pursuance of their promise contained in their letter to *Frestadius* of the 24th of *October* 1853.

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The three bills of 980*l.*, 220*l.*, and 100*l.* were duly paid by *Hoare & Co.*

On the 9th *November* 1853, the Appellants commenced an action in the Exchequer against *Dresser* to recover the shipping documents detained by him. The bill for 1,312*l.* 1*s.* 9*d.* was paid by *Dresser* when due.

On 19th *December* 1853, *Dresser* filed his bill against the Appellants, and *Johann Norrbom* (which bill was afterwards amended and re-amended), and after alleging the circumstances, prayed for an account of the dealings between himself and *Norrbom*, and that a perpetual injunction might be granted restraining the Appellants from prosecuting the action against *Dresser*, with reference to the cargoes or bills of lading, or otherwise in respect of the matter aforesaid, from parting with or negotiating or otherwise dealing with the bill for 1,312*l.* 1*s.* 9*d.*, and that they might be held liable for the amount of the said bill, and decreed to pay the same to *Dresser*, with interest thereon, towards making up the balance due to him on the account, and that they might be ordered to pay the said sum into Court, to await the result of the account, and for further relief.

On 23d *December* 1853, Vice-Chancellor *Kindersley* granted the injunction to prevent the Appellants from proceeding with the action, but refused it as to their negotiating the bill.

Dresser entered an appearance for *Norrbom*, who was out of the jurisdiction.

The cause came on to be heard before Vice-Chancellor *Kindersley* on 5th *July* 1855, when his Honor made a decree, by which it was ordered that an account should be taken; that the injunction of the 23d *December* 1853

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should be continued ; that *Hoare & Co.*, the Defendants, were entitled out of the proceeds of the bill for 1,312 *l.* 1 *s.* 9 *d.* to repay themselves the advances made by them in respect of the three bills for 980 *l.*, 220 *l.*, and 100 *l.*; that *Dresser* should pay the costs, including the costs of the injunction awarded by the order dated 23d *December* 1853, but without prejudice to the right of *Dresser* to be reimbursed by *Norrbom*. And farther directions were reserved.

Upon appeal to the Lords Justices, they, on 31st *Janu—*
ary, made an order to vary the decree of the *Vice-Chan—*
ccllor, and to “declare that *Dresser* is entitled to be paid in the first place, out of the proceeds of the cargoes of timber consigned by the vessels *Verene* and *Christiane* sums of money advanced, &c. by him in respect of the three several parcels of timber contracted to be delivered at the ports of *London*, *Bristol*, and *Gloucester* respectively, and also his commission for them, and his notarial charges in respect of the bill of exchange for 1,312 *l.* 1 *s.* 9 *d.*; and that in case the said proceeds shall, upon taking the account, be found deficient, the Defendants, *Richard Hoare & Co.*, are liable to make good to the Plaintiff such deficiency, to the extent of the sum of 1,312 *l.* 1 *s.* 9 *d.*” And an account was directed between *Dresser* and *Norrbom* (which the Defendants were to be at liberty to attend); and the injunction awarded by the order of 23d *December* 1853, was continued. The sum found due to *Dresser* was 1,254 *l.* 3 *s.* 7 *d.*

Sir *R. Bethell* and Mr. *Druce* for the Appellants

It may be admitted that there was a general contract *Norrbom* to consign to *Dresser* two loads of timber, that the bills accepted by *Dresser* were drawn accepted in respect of the timber so promised; but

gives him no right as against *Hoare & Co.* to retain the bills of lading of this particular timber; for any timber would have answered that general contract, while here specific ship loads of timber were given over to *Hoare & Co.* in virtue of the bills of lading which were transmitted to them. He puts his right on the antecedent letters of *Norrbom* to him. They are insufficient for that purpose, since they only amount to a promise to send timber, which promise might be complied with by sending any timber. It is only when there has been a specific appropriation of property, that a claim such as that which *Dresser* sets up can be admitted, *Wait v. Baker* (b). [Lord Wensleydale: The appropriation there was by a bill of lading]. No particular timber was here specifically appropriated to *Dresser*. Suppose after the letter to *Dresser*, *Norrbom* had sent over four cargoes in four different ships, any two of which would have been sufficient for fulfilling the promise he had made to *Dresser*; which of the four could *Dresser* have claimed as his? None; he must have asked for a specific appropriation of two; he could not have taken them as of his own right. [The Lord Chancellor: Do not the letters of the 30th June, and 24th August 1853 amount to an appropriation?] They do not. *Norrbom* had at that time an intention to send these cargoes to *Dresser*, but these letters were not so expressed as to be binding on him for that purpose. In *Wait v. Baker*, the names of the ships and cargoes were mentioned, but that was not held to be an appropriation of them. The mere acceptance of a draft on the faith that such an intention will be carried into effect will not convert that intention into an appropriation.

The circumstances here do not establish that *Hoare & Co.* had any notice of the claim of *Dresser* as against the timber which had been forwarded to them. Even *Dresser's*

(b) 2 Exch. Rep. 1.

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representation of the conversation with *Hoare's* clerk does not amount to a notice of a claim of right; but had it done so, there is no ground for saying that it was binding upon *Hoare & Co.* Nor was it at all compatible with the letter which, on the same day, was sent by *Dresser* himself to *Hoare & Co.* for the purpose of getting possession of the bills of lading. That letter is binding on him to accept the bill for 1,312 *l.* 1 *s.* 9 *d.*, or to return the bills of lading, and thus, by one mode or the other, to give to the Appellants the means of covering their acceptances made in favour of *Norrbom*. *Dresser* made an unconditional acceptance of the bill, and sent it to *Hoare & Co.*, who from that time were entitled to believe that they had a full right to deal with it, for they were not the mere agents of *Norrbom*, but principals in the transaction.

But though no legal right to these cargoes existed in *Dresser*, such a right did exist in *Hoare & Co.* Their agent, *Kleman*, had given *Norrbom's* agent, *Frestadius*, the assurance that the bills would be accepted by them, and that assurance was binding on them, and was equivalent to an acceptance, and on that assurance the cargoes were consigned to them.

There is one other objection, and that affects the jurisdiction of the Court in this case. The whole foundation for the proceeding here is an account which is asked to be taken against a man in *Sweden*, and the decree treating that account as unfavourable to him makes it the foundation for giving to *Dresser* a remedy against *Hoare & Co.*

The *Solicitor-General* (Sir *H. Cairns*) and Mr. *Lee Sims Williams* was with them), for the Respondent.

The questions here are three: First, whether as between *Norrbom* and *Dresser* there was, in equity, a right in part of *Dresser* to require that the particular cargoes mentioned in *Norrbom's* letters should be sent to him

condly, whether *Hoare & Co.*, having been originally the agents, and nothing more, of *Norrbom*, acquired a higher title to the timber by reason of the engagements which they came under in respect of these cargoes? Third, whether at the time *Hoare & Co.* came under these engagements, they had notice of the rights of *Dresser* as against *Norrbom* with respect to the equity already mentioned?

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This case differs from one of legal title to goods in trover. *Wait v. Baker*, therefore, does not apply. It is not necessary here to show that the property has actually passed; it is sufficient if there is a valuable consideration for a contract which is to be executed at a future time, as, for instance, to pay over the proceeds of a whaling voyage. In such a case the right of the person thus created in equity will be binding on every other person who has knowledge of it, *Langton v. Horton* (c). In that case, where a previous mortgage of the expected cargo of a whale ship was held valid as against a subsequent judgment creditor, the *Vice-Chancellor* said, "I will suppose the case of the owner of a ship which is going out in ballast proposing to borrow of another person the sum of 500*l.* to pay the crew and furnish an outfit, and agreeing that in consideration of the loan the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the assignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the *South Sea* fishery, that the fruit of the voyage, the whales taken or the oil obtained, shall be his security for the amount of his advance."

Suppose *A.*, with the knowledge of *B.*, has a granary

(c) 1 Hare, 549.

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full of corn, and contracts with *B.* to put 500 tons of this corn on board ship, and to give him the bill of lading for it; and suppose *A.*, by mistake or otherwise, sends the bill of lading to another man, and does not put the corn on board, *B.* cannot maintain trover for the corn, because no particular portion of the corn in the granary was mentioned; but he has a remedy in equity for non-performance of the contract. So it is sufficient here for *Dresser* to show that he was informed that there were cargoes of timber ready to be put on board to be sent to him, and that he accepted bills as against these cargoes. That amounted to an appropriation to him of these cargoes. [Lord *Wensleydale*: But suppose the agreement you mention is not to ship the corn in the granary, but corn which he has afterwards to purchase for that purpose from other persons, and so *non constat de corpore*]. That does not make any difference. When *A.* makes the purchase, equity says that he does so in fulfilment of the contract, and therefore in *Wellesley v. Wellesley* (*d*), it was held that there having been a covenant to secure, before a certain day, an annuity by a charge on the freehold estates of the covenantor, a lien in favour of the covenantee was held to have been created upon any land to which the covenantor became entitled between the date of the covenant and the day limited for its performance. The Court fixed the equity on the land. On this point that case has never been doubted. So in *Burn v. Carvalho* (*e*), a promise by *A.* that he would direct his agent *B.* at a foreign port to deliver goods to the agent of *C.* at that port, and a delivery by *B.* in consequence, were held valid as against the assignees of *A.*, though the commission was issued before the letter of direction reached *B.* [Lord *Wensleydale*: We had held in the King's Bench (*f*), that there was no legal or equitable

(*d*) 4 Myl. & Cr. 561.

(*e*) Id 690.

(*f*) 4 Barn. & Ad. 382. 1 Ad. & El. 883.

assignment of these goods; but Lord *Cottenham* said, that though we were right at law, we were wrong in equity]. The want of the *obligatio certi corporis* would prevent the property passing at law, but in equity it would not affect the right of *Dresser* as against *Norrbom*, or as against anybody who claimed under him, and had notice of the real state of things. What was done here amounts to an equitable assignment, and the doctrine of specific performance applies. If the owner of a *West India* estate contracts to send sugar in repayment of advances, the contractor may not be able to maintain trover for the sugar, which, of course, is unascertained, but he can maintain a bill for specific performance. *Lumley v. Wagner* (g) went on that principle. In that case Lord *St. Leonards* thus expresses himself (h): "Wherever the Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, so far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give:" and though the Court there could not possibly enforce performance of the contract to sing at the Plaintiff's theatre, it exercised its power to prevent the violation of one stipulation in the contract, which was, not to sing elsewhere.

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It is clear that here there was ample consideration for the promise made to *Dresser* [the facts were stated, and argued on]. *Hoare & Co.* were only agents for *Norrbom*, and could not, and did not at any time, acquire a better title than *Dresser*. *Kleman's* letter did not amount to an acceptance of the bills.

(g) 1 De G. Mac. & Gord. 604. (h) Id. 619.

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Then as to the question of notice. The conveyance with the clerk shows that *Hoare & Co.* had distinct notice of *Dresser's* claim. The rule in equity only requires a knowledge as will put a man on inquiry, *Vane v. Arnold* (i); *Smith v. Low* (k); and notice to a servant sufficient, *Maddox v. Madlox* (l). The evidence shows that *Hoare & Co.'s* clerk was fully informed of the real state of the facts; and even the exclamation of *Dresser's* clerk proves that *Dresser* deemed his claim to be answerable, and not to be one which he had the intention to relinquish. There was, therefore, notice.

Sir *R. Bethell*, in reply :

There can be no doubt, on the facts of this case, that *Hoare & Co.* could, in an action of trover, have recovered possession of the bills of lading, for they had been fraudulently obtained by *Dresser*, who had consequently a right to retain them. As to notice, the principle is clearly explained by Lord *Lyndhurst* in *Jones v. Smith* :—“I do not think that the present case goes beyond this, that a prudent, cautious, and wary person would require farther. The want of that prudence, caution, and wariness, is not sufficient, according to the decision in the principles which have hitherto been acted on to affect a party with notice.”

The *Lord Chancellor* (Lord *Chelmsford*), after stating the facts, said :

Upon these facts the first question which was argued at your Lordships' bar, was, whether there was an assignment

(i) Gilb. Eq. Rep. 7, 8.	(l) 1 Ves. 61.
(k) 1 Atk. 490. See <i>Montefiore v. Browne</i> , ante p. 241.	(m) 1 Phill. 244, 257.

priation of the specific cargoes of the *Verene* and the *Christiana* by *Norrbom* to *Dresser*. If this question had arisen at law, the case of *Wait v. Baker* (n) would have appeared to me a decisive authority that no property passed in these cargoes to *Dresser*, so as to enable him to maintain an action for them. But the question in equity is not whether the property in the cargoes actually passed to *Dresser*, so as to give him a legal right, but whether there was not a contract for timber which, though general at first, was, by the subsequent transactions between the parties, rendered specific, so as to enable *Dresser* to assert an equitable title to it? I entertain no doubt that, although at the time of the acceptance of the bill of exchange for 500 l. no timber had been specifically appropriated as the cargoes to be sent to *Dresser*, yet that when the *Verene* and *Christiana* were laden with timber expressly for the purpose of satisfying the contracts which had been entered into on account of *Norrbom* for the supply of the exact quantities shipped for *Bristol* and for *London*, *Dresser* had an equitable title to the property in these cargoes, which he could enforce against *Norrbom*, or against any other person claiming from *Norrbom*, with no better title than he possessed.

The next question is, whether *Hoare & Co.* were merely the agents of *Norrbom*, or whether they acquired any rights independently of *Norrbom*, which were available against *Dresser*? *Hoare, Buxton & Co.* were strangers to *Norrbom*, and, as far as appears, to *Dresser*, until this transaction. Their part in it commenced with a letter from *Frestadius* to them, of the date of the 14th *October* 1853, by which he advised them, that, according to the order of *Norrbom*, he had drawn upon them for 1,300 l.,

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(n) 2 Exch. Rep. 1.

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in three bills of 100 *l.*, 220 *l.*, and 980 *l.*, at ninety days' date, and stating, that "advice letter of these drafts had been forwarded to Mr. *Kleman*, who had promised to forward it to them, and to write thereabouts." *Kleman* did write a letter to *Hoare & Co.*, on the 17th *October* 1853, which they received on the 24th *October*, enclosing a letter from *Norrbom*, with documents of shipments on account of *Henry Dresser*, and a draft on him for 1,312 *l.* 1 *s.* 9 *d.*, against which *Frestadius* had been authorised to draw at ninety days' date, for 1,300 *l.*, *Kleman* adding, "knowing *Dresser & Co.* to be very good, I have not hesitated to assure Mr. *Frestadius* that you will promptly honour his draft to Mr. *Norrbom's* debit."

It was contended by the counsel for the Appellants, that this assurance by *Kleman*, the agent of *Hoare & Co.*, was an engagement for them which amounted to an acceptance of these bills. But, admitting the statement in the letter to be evidence of the fact, I do not think that what passed between *Kleman* and *Frestadius* can be considered as equivalent to an acceptance of the bills, or that any liability was imposed upon *Hoare & Co.* at this period.

The bills of lading of the cargoes of the *Verene* and the *Christiana* having been sent by *Norrbom* to *Hoare & Co.* in the letter of the 6th *October* 1853, forwarded by *Kleman*, it becomes necessary to consider in what character *Hoare & Co.* received those documents. The Respondents say, that they were the agents of *Norrbom* in the transaction; and their attornies state, in a letter written to *Dresser*, that "they were acting in the matter merely as the agents of *Norrbom*." This, in a certain sense, was true; they were the agents of *Norrbom* to obtain the acceptance of the bill for 1,312 *l.* 1 *s.* 9 *d.*, and the acknowledgment by *Dresser* of the correctness of the account current and of the delivery of the cargoes of wood, and *then* to deliver the bills of

lading to *Dresser*. But *Hoare & Co.* were something more than agents, and had an interest of their own in the transaction, independently of *Norrbom*. The bills of lading and the unaccepted bills of exchange were sent to *Hoare & Co.*, that they might have in their hands a security for the acceptance for 1,300 *l.*, which they were, at the same time, requested to give. If *Dresser* accepted the bill for 1,312 *l.* 1 *s.* 9 *d.*, *Hoare & Co.* would be able to pay themselves out of that bill. If *Dresser* refused to accept the bill, then *Hoare & Co.* would have the bills of lading of the cargoes for their indemnity.

It is quite clear, therefore, that *Hoare & Co.* had an interest beyond their character of agents for *Norrbom*. Did they, then, incur liabilities before they had any notice of *Dresser's* rights as against *Norrbom*? *Hoare & Co.*, upon the receipt of the letter from *Norrbom*, sent *Matton*, their clerk, to *Dresser* with the letter from *Norrbom* to them, and also with the draft for 1,312 *l.* 1 *s.* 9 *d.* *Matton*, in his affidavit, says, that he translated to *Dresser* such parts of the letter of *Norrbom* as related to the instructions given by *Norrbom* to *Hoare & Co.*, with reference to giving up the shipping documents upon his complying with the conditions imposed by the letter of *Norrbom*; that *Dresser* appeared unwilling to accept the draft drawn upon his firm upon the terms stipulated in *Norrbom's* letter to *Hoare & Co.*, but said he should not give a positive answer until he had examined the documents; that *Matton* then put the bill for 1,312 *l.* 1 *s.* 9 *d.* in the box, for "Bills for acceptance," in *Dresser's* counting-house, and said he would write in a formal manner, repeating the conditions contained in *Norrbom's* letter, and this he did as soon as he returned home. *Dresser* and his clerk, *Matton*, in their affidavits, say, that *Dresser* stated to *Matton*, that the proceeding was a strange one, as the cargoes were already

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his, and that he had made advances to *Norrbom* in respect of them, and that the proceeding on *Norrbom's* part was a regular swindle.

I do not think that these expressions of *Dresser's* were a sufficient notice to *Hoare & Co.* of his rights in the bills of lading. But, if they might be so considered, had nothing else occurred, the subsequent conduct of *Dresser* must have led *Hoare & Co.* to believe that they were not insisted upon prior to their undertaking a liability upon the bills of exchange sent to them for acceptance. It is to be observed, that *Dresser*, in an affidavit which was made after the Appellant's answer, says, "that being taken by surprise at finding that the bills of lading had been sent to the firm of *Hoare & Co.*, with instructions not to give up the same to him except upon the terms of his accepting a bill for 1 312 *l.* 1 *s.* 9 *d.*, he declined *at that time* to give his acceptance, and that the clerk of *Hoare & Co.* left the letter, account current, and bill with him, and went away." I think there is no doubt that *Dresser* learnt, in the interview with *Matton*, the conditions upon the compliance upon which alone the bills of lading would be delivered up to him, and that, acting under the advice of his solicitor, he resorted to a contrivance to obtain the bills of lading without complying with these conditions. He accordingly wrote the letter of the 24th *October* 1853, asking for the loan of the bills of lading, charters, and specifications, assigning as a reason for the request, that he could not examine the invoices without these documents, and promising to return them if, from any cause, he did not accept the bill for 1,312 *l.* 1 *s.* 9 *d.*

It is to be observed that *Hoare & Co.* must have been prepared for this application, as *Matton* must have told them that *Dresser* had said he could not give a positive answer as to accepting the draft until he had examined

the documents. The documents, however, were sent by *Hoare & Co.*, but whether at the time *Dresser* received them, the letter from *Hoare & Co.*, containing the conditions upon which they were to be delivered, had reached him, may be doubtful. This, however, appears to me to be immaterial. *Dresser*, in the postscript to his letter of the 25th *October* 1853, says, "Your letter of yesterday was not received until after the documents were handed to us, and we were not then aware of any stipulations." He denies, therefore, the statement of *Matton*, that, at the interview with him on the 24th *October*, *Matton* read that part of *Norrbom's* letter which related to the instructions to *Hoare & Co.* as to the conditions upon which the bills of lading were to be handed over. But, at all events, upon the receipt of the letter from *Hoare & Co.*, *Dresser* was distinctly informed of the terms upon which alone, according to their instructions, he could entitle himself to the documents. He had them in his possession, having obtained them by a stratagem, and he allows the whole of the 24th *October* to pass away without intimating to *Hoare & Co.* that the conditions sought to be imposed were such as he was not bound to perform.

It is admitted that by the letter of the 24th *October* 1853, to *Frestadius*, which was posted on the evening of that day, *Hoare & Co.* had become liable as acceptors of the bills for 1,300 *l.* : they were, therefore, in this position; *Dresser*, in the interview with *Matton*, had not absolutely refused to accept the bill for 1,312 *l.* 1 *s.* 9 *d.* ; "he had merely declined at *that time* to give his acceptance," and said he should "not give a positive answer until he had examined the documents." The documents were sent at his request to enable him to examine the invoices with them. He is informed, while the documents are in his possession under a promise to return them if he does not

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accept the bills, of all the conditions which he must perform before he can be entitled to them. He makes no objection to these conditions until after *Hoare & Co.* have come under engagements upon the faith of the security which *Norrbom* had sent to provide against them. *Hoare & Co.* had a right to consider that they were sure to have either the bill for 1,312 *l.* 1*s.* 9*d.* returned to them, accepted by *Dresser*, or the shipping documents delivered back upon *Dresser's* refusal to accept the bill, and in either event that they might with perfect security accept the drafts drawn upon them by *Frestadius*, and they accepted them accordingly. When therefore the bill for 1,312 *l.* 1*s.* 9*d.* was sent to them on the following day accepted by *Dresser*, without a single word of explanation, and after they had actually accepted one of the bills drawn upon them for 980 *l.*, *Hoare & Co.* had a right to retain that bill for 1,312 *l.* 1*s.* 9*d.*, to secure themselves against the liabilities which they had incurred under the circumstances which have been thus fully detailed.

It is unnecessary to pursue the matter farther, or to follow the proceedings of *Dresser* in the *Mayor's* Court, or to examine into the accuracy of the representations in the correspondence which afterwards took place. The rights of the parties were determined on the evening of the 24th October 1853. At that time *Hoare & Co.* must be taken to have been in possession of the bills of lading which *Dresser* had improperly obtained from them. They had by indorsement to them in blank a legal title to these bills. They had no notice of any better title than theirs existing in *Dresser*, who, having obtained these bills of lading, and given the acceptance for them, can have no equity as against *Hoare & Co.* to retain the documents, and to have the bill of exchange restored. And I am compelled to differ with the opinion entertained by the Lords Justices

upon this case, and to agree in the view of it taken by Vice-Chancellor *Kindersley*. I therefore recommend to your Lordships to allow the appeal, and to remit the cause, with a declaration that the appeal to the Lords Justices ought to have been dismissed with costs, and also with a declaration that *Dresser* ought to refund the 1,254*l.*, with interest at four per cent.

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Lord *Cranworth* :

My Lords, my noble and learned friend, the *Lord Chancellor*, has gone into this case so fully, that, agreeing entirely as I do with him, I should perhaps feel that I was discharging my duty if I were to say nothing beyond expressing my concurrence with him. But one or two propositions have been started in the argument, to which I think it necessary to advert, in order that it may not be supposed that they were acquiesced in by this House, or at least by one member of it.

The *Solicitor-General*, in his argument, seemed to me to suppose that if there had been a contract by *Norrbom* merely to send timber to this country, and if in this country timber of *Norrbom's* had been found, that would in itself have been sufficient in equity to entitle the Court to interfere, and stop that timber. Now, I apprehend, that in that respect there is no difference between law and equity. At law there must be a positive appropriation to give a legal title ; that was established in *Wait v. Baker*. So that however unjustly a party may be acting who says, I shall send you from abroad some timber by a particular ship, if in truth he sends it so as to make it the legal property of another, that legal property must prevail. The difference between law and equity I take to be this : that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a par-

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particular thing, such as to appropriate a part of a large cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand. As if a merchant here were to order from the *Black Sea* cargo of 100 quarters of wheat, and the correspondent were to say, "I have sent a cargo containing 500 quarters with directions out of it to let you have 100 quarters when the 500 quarters arrive, unless there be some legal or equitable right on the part of the holder to interfere," equity will give the merchant a lien upon the larger cargo just as it would, out of a large fund of money, give a lien on the appropriation of a smaller sum to any person who was equitably entitled to it. But I apprehend that neither in equity nor in law can there be any jurisdiction to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement.

I have thought it necessary to say this much; but the question does not properly arise here, because, in my opinion, if *Dresser* had taken the proper steps upon the arrival of the cargo, and before any liability had been incurred by *Hoare & Co.*, I strongly incline to think that he had an equitable right upon this timber. Looking at the letter which had been written, and at the fact of the sending of the timber which was sufficient to meet, and was evidently intended to meet, the claim of *Dresser*, I incline to think, though I have not looked at it very minutely, in consequence of the subsequent transactions appearing to me to render it unimportant, but I strongly incline to think that upon the facts of the case *Dresser* would have been

entitled to say against *Hoare & Co.*, "I have a right to have this timber which has been appropriated to me." But the question is, had he, after the timber had arrived, subject, I will suppose, to that equitable title on his part, the right to do so? I entirely concur with the *Lord Chancellor* that he had not. What has been construed as amounting to notice is that what passed in the counting-house of *Dresser* on the morning of the 24th of *October*. But when that is looked at strictly and critically, I quite agree with an observation that was made in the course of the argument, that mercantile transactions would be altogether unsafe if that is to be taken as notice. *Hoare & Co.* sent their clerk with a letter which they had received from *Norrbom*, consigning the timber to them in circumstances which clearly kept them safe, because, accepting the 1,300 *l.* of bills, they were sure to be safe either with the 1,312 *l.* bill or with the cargo. They sent their clerk to *Dresser*, desiring him to read over to *Dresser* the letter stating the terms on which the tender had been consigned to them, and in compliance with which they were to hand it over to him. The clerk positively stated, and the affidavits made on the other side do not dispute it, that he did read over the whole of this direction, as far as related to that particular part of the letter. It is impossible that *Dresser* should not have known from that letter that *Hoare & Co.* had in their hands a cargo sufficient to enable them to meet whatever liabilities they might incur if the 1,312 *l.* bill should not be accepted, and that they must rely therefore upon that cargo if the acceptance should not be given.

Now, what is the notice which the Respondent alleges was given? It is this: upon that letter being read over, Mr. *Dresser* says, and his clerk confirms him, "Why, this is a very strange transaction; this timber is mine, inasmuch as I have advanced money upon it." *Dresser* him-

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self says that he said, "They are already mine, and I have advanced money upon them." The clerk says that what he said was, "They are mine, as I have advanced money upon them," meaning I have a claim upon them by reason of having advanced money upon them; and the clerk, in a sort of slang language, adds, "It is a regular swindle." And *Dresser* says, "I cannot determine now what I shall do; I must have time to look into the documents." Thereupon the clerk of *Hoare & Co.* says, "Very well; then I will put the bill in the regular way into the bill box, that you may accept it, and I will go home and send you a formal statement of what the conditions are." Afterwards the clerk, it may be supposed, tells his principal what has passed. Now, I will even suppose that notice to the clerk would have been good notice to the principal, as to which I think there may be very grave doubts; but suppose that he told them every syllable of what had passed; what *Hoare & Co.* must have understood from it is this, that *Dresser* said, "I have advanced largely; this timber ought to have been sent to me; but whether I shall accept the bill or not, must depend upon what I shall think best after I have looked at the documents, and made myself thoroughly master of the matter."

Within a few hours afterwards, and in the course of the same morning, *Dresser* sends a letter, asking *Hoare & Co.* to lend him the documents, that he may compare all together, "and I pledge myself that you shall either have the documents back again, or the acceptance of the bill." Of course, when *Hoare & Co.* received that letter, they must, as men of ordinary familiarity with the transactions of the city of *London*, have understood that by having the bill or documents back again, it was meant that they were to have either free from any claim that was to be set up upon them by *Dresser*, because it would have been perfectly nugatory to

send them the bill accepted, he meaning at the same time or afterwards to assert that he had any title to that bill: that would have been merely illusory, a mode of misleading, instead of acting fairly and honestly towards them. And, I confess, I am rather surprised at that part of *Dresser's* affidavit in which he says that, although not conceiving himself bound by any legal obligation to give such acceptance, "yet from a wish to act fairly and honourably towards them, I, in the afternoon of the 25th of *October* sent them my bill." He sent them his bill, having, as he states, previously conferred with his legal adviser, and determined to institute proceedings that should set up an adverse title to that bill, and make it unavailing.

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It appears to me that this was no notice whatever that *Hoare & Co.* were bound to accept as such. *Dresser's* asking for the loan of the documents, and undertaking to return either the documents or the bill accepted, was a positive assurance that as far as they were concerned no adverse title should be set up by him to either the one or the other.

With regard to the timber, we have nothing to do now; that is all disposed of: the only question is, what is to become of the bill of exchange. In point of fact, the bill of exchange has been abstracted from *Hoare & Co.* They have come under liabilities which have been ascertained to be nearly to the full amount of the bill, which they have been obliged to pay.

I therefore entirely agree with the *Lord Chancellor* that the course to be pursued is, that the orders made by the Lords Justices should be reversed, with costs, and that the case be remitted back to the Court of Chancery, with a declaration that Mr. *Dresser* must refund the 1,254 *l.* with interest at four per cent.

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Lord *Wensleydale* :

I so entirely agree with my two noble and learned friends who have preceded me, in the opinion they have formed, and in the reasons they have given for it, that it might, perhaps, be entirely unnecessary for me to trouble your Lordships with any observations. But as the case is one of considerable importance in a mercantile point of view, I wish to make a few remarks upon it. Now that it has been investigated with the great care which it has received at the Bar at your Lordships' House, and every argument brought forward on both sides, I confess I do not feel the same degree of doubt in my mind which seems to have influenced the minds of the Lords Justices. I own it seems to me a case upon which we can give our opinion without any reasonable doubt.

In the first place it is perfectly clear that the legal title to these two cargoes was vested, by the delivery of the bill of lading to the agent of *Hoare & Co.*, on the 17th of *October*. A cargo is always represented by its title deed, the bill of lading. If the bill of lading is made out deliverable to the consignee, the consignee *primâ facie* is entitled to the property. If it is made out to the consignor or his assigns, and he indorses the bill of lading to any particular person, the right vests in him. If it is indorsed in blank, it vests in the bearer of the bill of lading, to whom it is delivered, with the intention to vest the property. These are propositions about which there can be no doubt.

Therefore on the 17th of *October*, at the time when the bill of lading came into the hands of the agent of *Hoare & Co.*, the property in that bill of lading vested in him as the factor; at all events until the time that he himself made an advance upon it, or came under a liability in respect of it. The factor to whom the bill of lading is

indorsed by the consignee, has a legal title to it, subject, of course, to account to his principal. If he had received the bill of lading merely as factor, and had no right of his own, then he would be liable to all the equities to which the principal was liable. In that case the equity, if there is equity on the part of *Dresser*, would prevail against the factor's title merely as factor. But when he came under an obligation in respect of those bills of lading, then if he came under that obligation without notice of *Dresser's* equitable title, his own title would prevail. We have, therefore, to consider at what time he became entitled in his own right to the bill of lading. Not, I think, on the 17th of *October* when that letter was sent by Mr. *Kleman* to him, giving him intimation of the bills that were drawn upon him. [His Lordship read it.]

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It was argued at your Lordships' Bar that this amounted to an acceptance by *Hoare & Co.* of this draft. Certainly it does not amount to an acceptance, because in the first place we have only the statement of Mr. *Kleman* that he has made this statement, which is no evidence of the fact of his having done so. But even if he had made the statement, it does not follow that it was a sufficiently positive assurance that the bill would be accepted so as to amount to an acceptance. It may be nothing more than a general statement that it probably would be accepted. Therefore I think it is impossible for Messrs. *Hoare & Co.* to say that they had come on the 17th of *October*, under an obligation to pay these bills, because the fact is not proved that any undertaking was made on their part by their agent. But upon the 24th of *October*, when the bills of lading were actually delivered into their possession, and when they had accepted the bills drawn on account of 1,300*l.*, and when they had promised to accept those bills by a letter to *Frestadius*, and when at half-past six o'clock

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on that day they had put their letter into the Post-office, it then amounted from that moment to an acceptance of those bills, and they then came under the liability to pay them, and they had a title of their own.

Therefore, the question is first whether there has been any equitable assignment to *Dresser*; and secondly, whether *Hoare & Co.* had due and proper notice of it, such as mercantile men would act upon.

Now, I do not stop at present to inquire whether there was, or was not, in this case an equitable assignment to *Dresser*. I certainly have considerable doubt whether such equitable assignment took place until the letter of the 29th *September* was written. At that time I think that what passed amounted to an equitable assignment of the cargoes which had been put on board those two vessels, the *Verene* and the *Christiane*. Up to that time I have very considerable doubt, after the able argument of Sir *Richard Bethell*, whether there could be what is called an equitable assignment. I take it to be perfectly clear that in order to create an equitable assignment, the obligation must be to deliver a particular chattel, not to deliver any chattel. It may be true that there may be in equity a bill for specific performance to deliver some chattel, as for instance, in *Wellesley v. Wellesley*. I apprehend it could not there have been treated as an equitable assignment of any particular chattel, though he had entered into an obligation to settle a sum of money upon any estate or any property of which he might become possessed. That would create an obligation upon him, which could be enforced in the Court of Chancery to make some settlement upon his property; but it could hardly be maintained that if after this general obligation he sold any property to a person who had notice of it, he could not convey any title to that property. Supposing he had sold a horse or any other

chattel, could it be said that it was subject to an equitable lien, for that he had actually charged it. It is perfectly true that a bill might be filed against him to make him fulfil his contract to settle a sum of money upon his estate, or upon some portion of his personal property ; but it would not, I conceive, create a lien upon any particular part of his personal property, even with notice of that general covenant on his part.

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But, in this case, though the contract was, I think, uncertain till the 29th of *September*, it appears that on the 29th of *September* there was a positive engagement that the bills of lading of these cargoes which had been put on board the *Verene* and the *Christiane*, should be transmitted to *Dresser*, and though *Dresser* refused to accept the particular bill that was drawn upon them, I think it may be well considered as an appropriation of those two cargoes to him, which would constitute an equitable lien on them in his favour.

Then comes the question whether, this lien existing, there was such a notice of it to *Hoare & Co.* as any mercantile man would act upon. Now, when we come to look at the notice which is alleged to have been given of the equitable charge, it seems to me so loose and unsatisfactory, that it ought not to be considered such a notice as any mercantile man would act upon. An account is given of what passed in the early part of the day on the 24th of *October*. [His Lordship read *Dresser's* statement.]

Was that communication merely to the clerk, without anything more, to show that a man really meant to insist upon his having an equitable claim to these cargoes? If he had intended to insist upon the lien, would not he, in the regular course of business, have written a letter to *Hoare & Co.*, to inform them that he had a lien, and to

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state that it was in respect of advances of such an amount that he had made upon the cargo? I think the affairs of commerce could not go on if it is to be considered that an equitable claim can be set up in this loose manner. But it does not stop there, because, I am perfectly satisfied with the argument of my noble and learned friends, that after this *Hoare & Co.* were led to believe, by the letter which they received from *Dresser*, that they would certainly have a security either upon the cargo itself, or upon the bill of exchange that was sent. It was tantamount to saying, after this loose statement had been made in respect of the claim, I give you notice that if you give me up the bills of lading, I will give you either these bills of lading back again, or the bill of exchange. And I think, being in that situation, knowing certainly that they should have the one remedy or the other, they were perfectly right in accepting the bills of exchange drawn upon them, and parting with them out of their possession. It cannot be said that this equitable lien is to prevail after *Dresser* has so conducted himself; his conduct amounts to saying, On my part I have stated my objection to your claim, but I am quite satisfied that you must have either the bill of exchange, or the bills of lading. That was quite enough to justify *Hoare & Co.* in accepting the bills of exchange.

I think, therefore, on the whole, that although there was in this case an equitable claim on the part of *Dresser*, yet that he did not give notice of it in the first instance, in a way in which any mercantile man would give notice of a claim upon which he really meant to insist. But, after he had made this claim in this loose way, he then gave an opportunity to *Hoare & Co.* to take their choice, by either having the bill of exchange, or the bills of lading, admitting that they must have the one or the other, and that as,

under these circumstances, they accepted the bills drawn upon them, they were perfectly justified either in retaining the bill, or in insisting upon having back the goods.

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Lord *Kingsdown* :

I must always entertain great distrust of my own opinion when it differs from that of the *Lords Justices* ; but after the best consideration I have been able to give to the case, I think that the view taken of the rights of the parties by the Vice-Chancellor *Kindersley* is the correct one.

It may be assumed, for the purposes of the present decision, that *Hoare & Co.* had incurred no liability for *Norrbom* before the evening of the 24th of *October* 1853, that *Dresser* on that day might, if he had so pleased, have established by a suit in Chancery an equitable lien on the cargoes in question for the amount of his advances to *Norrbom*, and that such notice of his claim was conveyed to *Hoare & Co.* by the conversation of their clerk with *Dresser* on the morning of the 24th of *October*, as would have affected *Hoare & Co.* if *Dresser* had proceeded with due diligence to assert his lien.

But it by no means follows, that because *Dresser* had or supposed he had such right, he would necessarily insist upon it. He might very possibly deem it more to his advantage to take peaceable possession of the goods, on the terms of accepting *Norrbom's* bill in favour of *Hoare & Co.* than to assert his equitable right by means of a Chancery suit against the legal title of *Hoare & Co.* under the bills of lading. Notice, therefore, of the existence of his adverse title, or of his belief in such adverse title was by no means notice that he meant to insist upon it. And the real question in this case, as it seems to me, is this, whether what passed between *Dresser* and *Hoare & Co.*,

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subsequently to the interview on the morning of the 24th of *October* did not authorise *Hoare & Co.* to act on the assumption that *Dresser* would not insist on such title to their prejudice.

At this interview, it is clear that *Dresser* had not decided on the course which he should take. If he determined to rely on his previous equitable title, he would, of course, refuse acceptance of the bill in favour of *Hoare & Co.* He desired to have time allowed to examine the invoices which had been delivered to him, and to consider after such examination, whether he would give his acceptance or not. It might depend upon the value of the goods as appearing upon those invoices, and upon the state of the accounts between them and *Norrbom*, whether it would be more for his interest to comply with the terms of *Norrbom*, however unjust and unreasonable, and thus obtain possession of the bills of lading, and, by means of the bills, immediate and quiet possession of the goods on their arrival in *England*, or to reject those terms, refuse acceptance of the draft of *Norrbom*, and proceed by a bill in Chancery.

It appears, that he did examine these invoices, but the invoices alone would afford no assurance, that the goods mentioned in them were actually loaded on board the vessels to which the invoices referred. This could appear only by the bills of lading. And for the purpose, or with the pretext of comparing the invoices with the bills of lading, he wrote the letter on the afternoon of the 24th of *October*, upon which, it seems to me, that his case must depend. In that letter, he requests the loan of the bills of lading, charter, specification of the cargo, &c., and assigns as a reason for borrowing them, that he may "examine the invoices with the above documents." And he

distinctly engages to return the documents to *Hoare & Co.* if, from any cause, he does not accept the bill for 1,312 *l.* 1 *s.* 9 *d.*

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Hoare & Co. might reasonably infer that, if the bills of lading were found to confirm the invoices, as, in fact, they did, *Dresser* would accept the bill. For what other purpose could he desire to compare the documents? That this was the intention of *Dresser* is plain, from the explanation of the transaction which he gave in the letter of the 26th of *October*, in this passage, "We then wrote a letter to you, requesting you to send us the shipping documents for the purpose of comparing with the invoices that we might accept the bill; and if, from any cause, we did not accept it, we would return the papers. We received the shipping documents accordingly, found them to agree, and accepted the bill."

In this state of circumstances, on the evening of the 24th of *October*, *Hoare & Co.* came under an engagement to answer the drafts of *Norrbom*, and when, on the following day, they received the acceptance of *Dresser*, they had already given full value for it.

Hoare & Co. acted, as they had a right to act, on the assurance that *Dresser* would either return the papers, or give his acceptance. It was in the option of *Dresser* which alternative he should adopt, and he adopted the latter.

It is said that, if instead of accepting the bill he had returned the papers, he might still, by means of a suit in equity, have established his title against *Hoare & Co.* Whether that would have been so or not, it is unnecessary to consider, for he did not adopt that course. He proceeded in the manner which he thought most for his own interest by availing himself of the legal title under the bills

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of lading, which he could use only on the condition giving his acceptance of *Norrbom's* bill.

It is hardly disputed by the Respondent, that if the acceptance, instead of the conditional promise to accept had been given before Messrs. *Hoare & Co.* incurred the liabilities, they would have been entitled to indemnify themselves out of the proceeds of *Dresser's* acceptance. In my opinion, they must be considered in the events which have happened, to stand in the same position as if the acceptance had been given at the time when they received the conditional promise to accept.

It is very possible that *Dresser* may have over-reached himself in this transaction; and, in attempting to obtain an unfair advantage, may have lost an advantage to which he was justly entitled. But this is the consequence of his own conduct, a consequence, perhaps, for the sake of mercantile fairness and good faith, not much to be regretted; at all events, not one from which he is entitled to be relieved at the expense of those whom that conduct has misled.

Orders reversed, and cause remitted, with a declaration

The following order was afterwards made:—"That the said two orders of the Lords Justices of the Court of Appeal in Chancery, dated respectively the 31st of *January* 1856 and the 30th of *July* 1856, complained of in the said appeal, be, and the same are hereby reversed: and it is declared, that the motion of appeal before the Lords Justices ought to have been refused, with costs; and it is further ordered, that the said Respondent, *Henry Dresser*, do repay to the said Appellants, *Richard Hoare*, *Edmund Charles Buxton*, and *Francis Hoare*, the sum of 1,254*l.* 3*s.* 7*d.*, paid by the said Appellants to the said Respondent, *Henry Dresser*, under the said order of the

30th of *July* 1856, together with interest thereon at the rate of 4*l.* per centum per annum, calculated from the time of payment thereof, and also the costs incurred by the said Appellants in the proceedings before the Lords Justices of Appeal in the Court below: and it is also farther ordered, that the cause be remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this declaration and judgment."

Lords' Journals, 21 March 1859.

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WM. EWART - - - - Plaintiff in Error.

SIR J. R. GRAHAM, Bart. - Defendant in Error.

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The right of hunting, shooting, &c., is an interest in the realty, and a grant of it is a license of a *profit a prendre*.

This right was in the owner of a manor. There was no right of free warren in the manor. An Act of Parliament, reciting that "there is within and parcel of the said manor a certain stinted pasture, called *Bailey Hope*," that *J. G.*, as lord of the manor, was owner of the soil thereof, and was "entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges in and over the same," that he and all the owners of tenements thereon, were entitled to cattle-gates and rights of turbary thereon; and that for the purposes of improvement it was desirable to allot the stinted pasture, in severalty, among the persons entitled to the cattle-gates; enacted that it should be so allotted; and made each allotment "freehold to all intents and purposes," but, provided that nothing therein contained, shall prejudice, &c., the rights, &c., of *J. G.*, his heirs and assigns, lords of the manor of *N.*, to any seignories, &c. belonging to such manor: "but that the said *J. G.*, his heirs and assigns, shall, and may at all times hereafter enjoy all rents, services, &c., and also all right of hunting, shooting, fishing and fowling, on, through, and over the said stinted pasture, and every part and allotment thereof, and all other seignories, royalties and privileges to the lord of the said manor of *N.*, for the time being, incident or

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belonging (other than those declared to be barred by this Act), as full a manner as if this Act had not been passed :”

HELD, that this proviso did not apply to mere manorial rights, but that the exclusive right of hunting and shooting over the allotment was thereby reserved to *J. G.*

Greathead v. Morley (3 Man. & Gr. 139) questioned.

IN this case an action had been brought by Sir *Robert Graham, Bart.*, against *William Ewart*, and by the order of Mr. Justice *Crowder*, the questions between the parties being questions of law were stated in a special case for the opinion of the Court. The facts thus stated were these :

The Plaintiff is son of Sir *James Graham, Bart.*, deceased, who, at the time of the passing of the *Bailey Hope Inclosure Act, 51 Geo. 3, c. x*, was lord of the manor of *Nicholforest*, in the county of *Northumberland*, and the Plaintiff is now the lord of that manor. The Defendant is the owner of certain premises in the same manor called *Clint* allotment and *Woodside* allotment.

The tenements held of the manor are customary estates, alienable by deed, surrender, and admittance, and descendable from ancestor to heir, as of the hereditary right of the tenants, called tenant right, held of the lord of the manor for the time being, as of his manor, by rents, fines, heriots, and services, according to the custom, the soil and freehold of the manor being in the lord.

At the time of the passing of that Act (which is to form part of the case)(a), there was within and parcel of the manor

(a) The Act recites, “That Sir *James Graham, Bart.*, is lord of the manor of *Nicholforest*, &c., and there is within and parcel of the said manor a certain stinted pasture, called *Bailey Hope*, by estimation, 4,000 acres ; and that the said Sir *J. G.*, as such lord of the manor, is owner of the soil of the said stinted pasture, and is entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges in and over the same that Sir *James* and others were owners of messuages, &c. in respect

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a tract of uninclosed land, being a stinted pasture containing 4,000 acres, or thereabouts, called *Bailey Hope*, and which they were entitled to "cattle-gates on the stinted pastures, and to rights of turbary, and other rights thereon;" that the stinted pasture in its present state was incapable of any considerable improvement, and it would be of great benefit if it was divided and allotted in severalty among the persons entitled to the cattle-gates: and then came the enactments providing for this allotment under the order of the Commissioners. The following parts of sections are material.

Section 14. The Commissioners are "required to allot, set out, and award unto and for Sir J. G., as lord of the manor of *Nicholforest*, his heirs and assigns, such part of the said stinted pasture as shall (quantity and quality considered) be equal to one full twelfth part or share thereof (after certain charges specially provided for) in lieu of that full recompense and satisfaction for all his and their right and interest as lord of the said manor, of, in and to the soil of the residue of the said stinted pasture.

The 15th section enacted, that the Commissioners should then allot the residue between Sir J. Graham and the other persons entitled to cattle-gates according to their messuages and the number of stints attached thereto.

Section 16. After award executed, the allotments to be freehold.

Section 18. Geese, lambs, and sheep were not to be depastured unless their owners were responsible for any damages they occasioned to neighbours' allotments.

Section 21 authorised exchanges to be made.

Section 23 provided, that "Sir J. G., his heirs and assigns, lords of the manor of *Nicholforest*, for the time being, shall for ever be taken to be the owner of all the mines, &c., within or under the several and respective parts of the said stinted pasture, &c.;" and shall have full power to work the same, "in the like manner as if this Act had not been made, he, Sir James Graham, his heirs and assigns, and lords of the manor of *Nicholforest* for the time being, making reasonable satisfaction for the damage to be done to the owner or owners of the said allotments."

Section 31 enacted, "That nothing herein contained shall prejudice, lessen, defeat the right, title, or interest of the said Sir J. G., his heirs or assigns, lords of the manor of *Nicholforest* for the time being, of, in, or to any seignories, royalties, rights, or services incident or belonging to such manor; but that the said Sir J. G., his heirs and assigns, shall and may, from time to time, &c., hold and enjoy the same respectively; and all rents, services, &c., and all

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Sir *James Graham*, as lord, was the owner of the soil of *Bailey Hope*, and entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges in and over the same, and, amongst others, to the exclusive right of hunting, shooting, fishing, and fowling in, through, and over *Bailey Hope*, and every part thereof. There was no right of free warren in or over any part of the manor.

Sir *James Graham* and other persons were also owners of tenements within the manor, and in respect whereof they or their tenants were entitled to cattle-gates in *Bailey Hope*, and to rights of common of turbary.

On the 3d *June*, 1814, an award under the Act for dividing and allotting *Bailey Hope* was made and deposited.

By this award an allotment was made to Sir *James Graham* in respect of an ancient estate belonging to him, called *Woodside*, which allotment adjoins the ancient estate, and contains 158 acres 2 roods 14 perches.

And an allotment was made to *John Ewart*, in respect of an ancient customary tenement belonging to him, called *Holmfoot*, which allotment contains 34 acres and 3 roods, and has been since called the *Clint* allotment. This last allotment was purchased by the Defendant's father in 1846.

On the 1st *February*, 1829, *John Ewart*, of *Walby*, grandfather of the Defendant, purchased the *Woodside* ancient estate, together with its allotment, from Sir *James Graham*, and on that occasion certain indentures were

mines, &c., and also all right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture, and every part and allotment thereof, and all other seignories, royalties, and privileges to the lords of the said manor of *Nickolforest* for the time being incident or belonging (other than those declared to be barred by this Act), in as full, ample, and beneficial a manner as they respectively could or might have enjoyed the same if this Act had not been passed."

executed, to which Sir *James Graham*, deceased, the Plaintiff, and the last mentioned *John Ewart* were parties. These deeds are to form part of the case (b).

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(b) The deeds referred to in this case had been executed on the 1st February 1823. By one, to which *John Ewart* (the father of the Plaintiff in Error), was party of the first part, and Sir *J. Graham*, Bart., and *James R. Graham* were parties of the second part, reciting that they had agreed to exchange their allotments, *Ewart* giving in addition the sum of 100*l.* for equality of exchange, the following reservations were made in favour of the *Grahams*: first, of the mines and minerals, with the means of working the same, giving compensation "for damage done to the herbage of the ground;" in working the same, *Ewart*, his heirs, &c. being allowed from time to time to dig "for so much limestone, clay, slate, marl, &c. &c., as may be requisite and necessary to be used and expended upon the said hereditaments, for the benefit and improvement of the same," "and also except and always reserved to the said Sir *James Graham* and *J. R. Graham*, and the lord or lords of the said manor for the time being, and to their companions, gamekeepers, and servants, the liberty and privilege of hunting, hawking, coursing, shooting, fishing and fowling, in and over all the lands lastly hereinbefore mentioned." "And also all free warrens, waifs, estrays and deodands, &c. &c., and all royalties whatsoever, to the lord of the said manor, now or at any time heretofore belonging," and "also that it shall be lawful for Sir *James Graham* and *J. R. Graham*, their heirs and assigns, companions and gamekeepers, and the lord or lords of the manor of *Nicholforest* for the time being, and such other persons as Sir *J. G.* and *J. R. G.*, their heirs and assigns, shall from time to time, permit or suffer to enter into the said messuage, &c., and the allotments of common adjoining or allotted thereto, and to exercise the right, liberty, and privilege of sporting and killing game thereon, without the lawful interruption of *J. E.* or his assigns," and to prosecute actions or prosecutions, &c. "Provided that nothing herein shall be construed to be a waiver or release by Sir *J. G.* or *J. R. G.* of any right of free warren, to which they may now be entitled over the several premises under and by virtue of any grant or grants, or otherwise howsoever."

The other deed of the same date was "an appointment or release by way of exchange," in which Sir *James Graham* and *J. R. Graham* were parties of the first part, and *John Ewart* of the second part. This deed contained the same reservations as the former to Sir *James Graham*, his heirs, &c. lords of the manor of *Nicholforest*, of mines and minerals, and of the right of hunting and shooting.

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On the 16th of *November*, 1852, *Andrew Ewart* sent the following letter to *J. Armstrong*, as gamekeeper of the Plaintiff:

“ Sir,

“ *Mire*, Nov. 16th, 1852—

“ *Andrew Ewart*, being legally advised that as the Proprietor of the estates of *Holmhead*, *Woodside*, and *Clint*, he, according to the new Act, entitling every proprietor to the exclusive right of disposing of his own game in the manner which seems most pleasing to himself, making null and entirely inoperative the old Inclosure Act, under which the common of *Bailey Hope* was originally divided, is authorised to discharge from the above said grounds any of Sir *James Graham*’s gamekeepers, whomsoever the right honourable baronet may think fit to appoint for that purpose. I, therefore, inform you that if you are found trespassing, and in pursuit of game, or training dogs, on the said commons appertaining to *Holmhead*, *Woodside*, or *Clint*, you will, after this notice, be prosecuted to the utmost rigour of the law.”

Since the year 1831, the owners of several of the allotments have shot and sported over them, claiming to do so as of right. The Defendant has shot and otherwise sported over the said *Woodside* and *Clint* allotments, with the authority of the owner thereof.

The lord has exercised the right of shooting since 1831, but concurrently with the owners of the said allotments.

The Court was to draw any inferences that a jury would be authorised to do ; and the questions were :

“ Has the Plaintiff the exclusive right of hunting, shooting, fishing, and fowling, or either of those rights, over the said allotments, or either of them ; and if either, on which ? ”

“ Has the Plaintiff a concurrent right as above ? ”

“Has the Defendant disturbed the Plaintiff in the enjoyment of his said rights, or either, and which of them?”

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The Court of Exchequer held that the Plaintiff had the exclusive rights of hunting, shooting, fishing, and fowling over the *Woodside* allotment, but not the exclusive rights of hunting, shooting, fishing, and fowling, or any of them, over the *Clint* allotment, and the Plaintiff had not a concurrent right over that allotment, and that the Defendant disturbed the Plaintiff by shooting game upon and over the said *Woodside* allotment. Judgment was therefore given for the Plaintiff (c).

The Plaintiff suggested error in due form; and, on the 26th November, 1856, the Court of Exchequer Chamber affirmed the judgment as to the *Woodside* allotment, but reversed it as to the *Clint* allotment (d).

This proceeding in error was then taken (e).

Mr. Serjeant *Hayes* and Mr. *Mellish* for the Plaintiff in Error :

The question is now entirely confined to the *Clint* allotment. There was no right of free warren in this manor. If therefore the manor land had been made freehold by any other means than by an Act of Parliament, there would have been no exclusive right in the lord. This is not a franchise, nor a seignorial right, but depends wholly on the ownership of the soil. That ownership being now transferred to *Ewart*, the right is at an end, so far as Sir *J. R. Graham* is concerned. It was not the object of the Act to give this exclusive right, which is odious in its nature, to the lord of the manor, and the words of the Act have not so

(c) 11 Exch. Rep. 326.

(d) 1 Hurl. & Norm. 550.

(e) The Judges were summoned, and Mr. Justice *Wightman*, Mr. Justice *Williams*, Mr. Justice *Willes*, Mr. Baron *Watson*, Mr. Baron *Channell*, Mr. Justice *Byles*, and Mr. Justice *Hill*, attended.

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given it. The object of the Act was the general improvement of the property, and the right now claimed by Sir *J. Graham* is opposed to that improvement, and consequently opposed to the declared object of the Act. The 14th section of the Act carries this object into effect, and compensates the Plaintiff "for all his right and interest as lord of the manor in and to the soil of the residue of the said stinted pastures."

The clauses of grant and of reservation must be construed together. The Act does reserve the right to the mines, and the power to work them; but there, as in the clause as to depasturing, compensation is to be made for the damage that may be thereby occasioned. Nothing of that sort is said as to the right of hunting and shooting, yet it would be as disadvantageous to the proposed improvements as the depasturing or the working of mines. It could not therefore have been meant to be reserved. A man may have free warren in his own soil by grant from the Crown, but such a grant is gross, and will not pass by a grant of the manor and appurtenances, *Morris v. Dimes* (f). There no doubt existed as to the intention, but the Court gave the legal meaning to words found in a legal instrument. The right to the mines here made the subject of a special exception, or it would have followed the grant of the soil to the present owner and have belonged to them. It cannot be contended that the saving clause as to the mines enlarged the power of getting minerals, and gave that power without the accompanying liability to make satisfaction for damage. On the contrary, the lord, before the passing of the Act, could have worked the mines without such liability; not so after it. The Act therefore could not have intended to confer on him another right, at least equally prejudicial to the

(f) 1 Ad. & El. 654.

tenant, and equally destructive to the general objects of the Act; for if it had been so intended, the grant of such a right would have been accompanied by a liability to compensate damage thereby occasioned. The case of *Greathead v. Morley* (g) cannot be distinguished from the present, and is decisive of it. There, as here, the right to the minerals, and the means of working them, were expressly reserved, but the Court held that the Act gave no right to the lord which he had not before possessed; and giving effect to the intention of the Legislature, even where an incorrect expression had been employed to declare that intention, the Court refused to apply a larger rule of construction to a clause where such intention was not made equally clear and undoubted. [The *Lord Chancellor*: Here the reservation is larger; it is not a mere general reference to his rights as lord of the manor, but it expressly reserves "the right of hunting, &c., over the stinted pasture, and every part and allotment thereof, in as ample a manner as if the Act had not passed."] The whole clause must be taken together. Now the clause begins by saying that nothing therein shall prejudice any rights of Sir *J. Graham*, &c., "incident or belonging to such manor, but" that he shall enjoy all the rights which are afterwards mentioned, and of which the right of shooting is one. That shews that the only right of shooting spoken of was a right which he possessed as lord of the manor, and as his rights as lord were extinguished over the parts allotted by the Commissioners, that right was extinguished with the rest. The second part of the exception is only explanatory of the first. What the lord gets by the Act is expressly declared to be "in lieu of and full recompence and satisfaction for" his previous rights. Those previous rights were taken

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(g) 3 Man. & Gra. 139, 3 Sc. N.R. 538.

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away. The General Inclosure Act, 41 Geo. 3, c. 109, s. 40 has a clause to the same effect, and that is the construction which it has always received.

The right now claimed by the Defendant in Error cannot be created at this day but by Act of Parliament, *Doe v. Lawes v. Davidson* (h), and there is nothing in this Act which creates it, or does more than preserve rights previously existing as incident to the manor. Here it is expressly found that he had not free warren, and it is not found that he had the right of chase. Yet what he claims here is a right of chase, *Comyn's Digest* (i). Such a right can alone justify the claim now set up, and he does not possess it. A saving clause of this sort, where, however, mines were not expressly mentioned, was held not to save mines situated under the new allotments, although at the time of the passing the Act there was a lease of the mines still subsisting, *Townley v. Gibson* (j). The only reservation here is of such right of hunting and shooting as he had at the time of passing the Act, and he had then no such right by way of royalty, but only as owner of the soil. A lord of the manor has no right as such to sport over the lands of others within the manor, *Pickering v. Noyes* (k) and that case shows that a person who sets up a claim to such a right is bound to prove it strictly. [The Lord Chancellor: Here is an absolute enactment that he shall enjoy the right of shooting, and the subsequent words do not diminish the force of that enactment.] The reservation is of rights which it was supposed the lord possessed; but now it is found that he did not possess them, they cannot be created in his favour, by words which were only used to continue what had previously existed.

(h) 2 Maule & Selw. 183.
 (i) Tit. Chase.

(j) 2 T. R. 701.
 (k) Barn. & Cress. 639.

Mr. *Manisty* and Mr. *Kemplay* for the Defendant in
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Here is a right known to the law ; it might be granted, and as to the *Woodside* allotment it actually was granted, and this right is reserved in express terms. This reservation is made in an Act of Parliament, the intention of which is to be looked at and followed with more closeness than might be the case with a deed, as was said in *Stowell v. Zouch* (l), though even in a deed a reservation of this kind amounts to a grant, *Wickham v. Hawker* (m), *Doe d. Douglas v. Lock* (n). It is a grant not of a mere licence, but of a benefit. The Act states that he had other rights than as owner of the soil, and it sets them forth ; and those rights are expressly reserved to him. The clause as to satisfaction for damage done in working the mines was necessary, because there might be damage occasioned by acts which were in excess of those he was, in strictness, entitled to do, in order to get the minerals ; besides which, before the passing of the Act, an injury so occasioned would be an injury to all the commoners ; but after the passing of the Act, and the allotment made under it, there might be an injury only to the owner of a particular allotment, and no such owner could obtain compensation without such an enactment.

Townley v. Gibson (o), does not affect the present case, for there the words of reservation were such as not only not to include mines, but almost to exclude them ; and of course the Court could not enlarge the expressions of an Act of Parliament. Here hunting, shooting, &c., are expressly reserved, and the argument on the other side amounts to this, that the Courts are to restrict the plain words of the

(l) Plowd. 366.

(m) 7 Mee & Wels. 63.

(n) 2 Ad. & El. 705,

(o) 2 T. R. 701.

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Act. *Greathead v. Morley* is either distinguishable from this case, or it cannot be supported.

Mr. Serjeant *Hayes* replied.

The *Lord Chancellor* (Lord *Campbell*), proposed the following question to the Judges :

“ Sir *James Graham* at the time of the passing of the Inclosure Act having been the owner of the soil of the *Bailey Hope* pasture, and having had by virtue of that ownership (but not otherwise) the exclusive right of hunting, shooting, fishing, and fowling over the said pasture, was he, after the inclosure had been completed, entitled to the right of hunting, shooting, fishing, and fowling over allotments made to the owners of lands within the manor of *Nicholforest* ?”

Mr. Justice *Wightman* :

Mr. Justice
 WIGHTMAN.

The Judges who heard this case, with the exception of my brother *Willes*, agree in answering your Lordship's question in the affirmative.

Before the passing of the Inclosure Act, Sir *James Graham*, as lord of the manor, was owner of the soil of the land to be enclosed, and as such had a right to hunt and shoot, &c., over it. The Act gives him an allotment in satisfaction of all his right as lord of the manor in the soil. If there had been no saving clause, he would, after the inclosure, have had no right to hunt or shoot, &c. — over the allotments made to other persons in freehold. The question, therefore, turns wholly upon the intention of the Legislature in the saving clause, and we are of opinion that, from the language used, it was intended to preserve to him his right of hunting and shooting, &c., over the lands allotted, whether his right before the Act passed was as owner, or, as some may have erroneously supposed,

lord of the manor merely, but that, in whatever character he exercised the right of hunting and shooting, &c., that right was preserved to him. The saving clause provides that "nothing in the Act shall defeat or lessen the right of the lord of the manor to any seignories, royalties, rights, or services, incident or belonging to the manor, but that Sir *James Graham* shall and may hold and enjoy the same, and all rents, &c., and all coal mines, minerals, ores, and metals whatsoever, and also the right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture, and every part and allotment thereof, and all other seignories, royalties, and privileges, to the lord of the manor incident and belonging, other than and except those which were expressly declared to be barred or extinguished by the Act, in as full, ample, and beneficial a manner as they would have enjoyed the same in case the Act had not passed."

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As Sir *James Graham*, the lord of the manor, undoubtedly had, as owner, the right of hunting, shooting, fishing, and fowling over the land to be inclosed at the time the Act passed, it is difficult to suggest a form of words better adapted to continue that right; and it seems to have been the clear intention of the Legislature that it should continue to be enjoyed, whatever might be the ground in respect of which it had been exercised. It is to be observed, that the mines and minerals are reserved by the same clause, and if that saving clause had been the only one relating to them, the same question would have arisen as to them, for it is only as owner that Sir *James Graham* would have been entitled, and the saving clause is in the same terms as to them, though there could be no doubt as to the intention to reserve them.

With respect to the case of *Greathead v. Morley* (p), it

(p) 3 Man. & Gr. 139.

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is to be observed, that the terms of the saving clause were in many respects so different from that now in question, that it may, upon that ground, be capable of being distinguished from this; but even if it were not, we do not feel bound by that as an authority, as it and the reasoning contained in it are open to many objections.

Mr. Justice *Willes* :

Mr. Justice
WILLES.

My Lords, I answer the question of the House in the negative; I think the intention of the saving clause was to preserve seignorial, not territorial rights. As to the mention of "coals," &c., in the saving clause, there may be a seignorial right to enter to take minerals without compensation, and that might be reserved by this clause; so that the introduction of them into the clause throws no light upon the question. It would be a useless repetition, for which I should be unpardonable, to go through the arguments already before the House in the judgment of Mr. Justice *Erle*, in the Exchequer Chamber, in which I concurred, and to which I beg leave to refer.

The Lord Chancellor (*Lord Campbell*) :

July 5.

My Lords, after attentively considering this case, I am bound to say that I entirely agree with the opinion of the majority of the Judges who were consulted by your Lordships. The nature of the right in question is exceedingly well explained in a learned and lucid judgment pronounced by my noble and learned friend on my left, when a Judge of the Court of *Exchequer*, in the case of *Wickham v. Hawker* (*q*). And from that it appears that this is an interest in the realty which is well known to the law. The property in animals, *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to

(*q*) 7 Meo. & Wels. 63. 75.

others to come and take them by a grant of hunting, shooting, fowling, and so forth ; that right may be granted by the owner of the fee simple, and such a grant is a licence of a *profit à prendre*. Substantially it may be reserved by the owner of the fee-simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee-simple.

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Now, my Lords, this being so, I think we must consider that Sir *James Graham*, being the owner of the fee-simple of the estate, had this right in him, and that substantially the bargain between him and those who were to become the allottees of the fee, was, that this right, which he had, should be reserved to him when this land was allotted to them under the Act of Parliament. Now the Act recites, "that the said Sir *James Graham*, as such lord of the manor, is owner of the soil of the said stinted pasture, and is entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges, in and over the same." The special case tells us specifically what those privileges were ; and it says that "at the time of the passing of this statute there was within and parcel of the said manor, a tract of uninclosed land, being a stinted pasture, containing 400 acres or thereabouts, called *Bailey Hope* ; and the said Sir *James Graham*, as such lord, was then the owner of the soil of *Bailey Hope*, and entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges, in and over the same, and, amongst others, to the exclusive right of hunting, shooting, fishing, and fowling, in, through, and over *Bailey Hope*, and every part thereof."

My Lords, it might well be that Sir *James Graham* should make this bargain, with those who were to be the allottees, to preserve this exclusive right of hunting, shoot-

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ing, fishing, and fowling, in and through *Bailey Hope*, and every part thereof. Then how are we to know what the contract was? It is contained in the Inclosure Act; and if that was the intention of the parties, I know not how it could be more clearly expressed than it is here. When we come to what is called the saving clause, we find it thus enacted—[His Lordship read it; see ante, p. 333.]

Surely the right which had existed in the lord is here reserved. It is said that this is to be confined to such rights as were manorial rights, incident and belonging to the manor. That is not so, because it reserves to him all “coals, mines, minerals, ores, and metals whatsoever” (not manorial rights) “and all powers of mining, working, and getting the same.” It is quite clear that *this* right of hunting, fishing, and fowling, *tale quale*, whatever it is, by whatever name it might be designated, was anxiously preserved.

I say nothing about the supposed odiousness of this right, because that cannot at all influence our decision. We have only to see what the Legislature has enacted, and I do not know that there would be anything at all discreditable in a person wishing to continue to enjoy that which he believed belonged to him as owner of the soil.

Great stress was placed upon the case of *Greathead v. Morley* (r). Now, I wish it to be understood, that I do not at all mean to say, that that case is not well decided. I give no opinion upon that: I am not called upon to give an opinion upon it. I think it is clearly distinguishable from the present. Speaking with great deference to the learned judges who thought that that case could not be distinguished from the present, I am bound to express my own opinion, that it is clearly distinguishable. Accord-

(r) 3 Man. & Gr. 139; 3 Sc. N. R. 538.

ing to *Greathead v. Morley*, the language of the reservation was uniformly, as it seems to me, confined to manorial easements. Here there is an express, absolute, and unqualified reservation which, I think, clearly reserves this right to Sir *James Graham* as if still owner of the soil. For these reasons, my Lords, I must advise your Lordships, that this judgment should be affirmed.

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Lord *Brougham*:

My Lords, I entirely take the same view as my noble and learned friend. Without being called upon to give any opinion whatsoever upon the case of *Greathead v. Morley*, I will only say, that I think it may be perfectly well decided; I do not say that it is not; but it is clearly distinguishable, upon the ground stated by my noble and learned friend, from the present case. I am, therefore, of opinion, with him, that your Lordships ought to give judgment for the Defendant in Error.

Lord *Cranworth*:

My Lords, I take exactly the same view of this case with my noble and learned friends. With respect to the case of *Greathead v. Morley*, I must make this observation. Either this case is distinguishable from it, or else the decision in that case, in my opinion, was wrong. We need not say which of these two alternatives we think the right one, and it would be improper for us to say, that we overrule a case which possibly may be distinguishable from the present. But, if not distinguishable, I have no hesitation in saying, that that case was wrongly decided. Here, after what is called the saving clause, there is an express enactment, "that Sir *James Graham*, his heirs and assigns, shall at all times hereafter enjoy the right of hunting, shooting, fishing, and fowling in and through and

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over the said stinted pasture, and every part and allotment thereof." If it had stopped there, I presume there could have been no doubt; but it goes on to couple that with "other seignories, royalties, and privileges, in as full, ample, and beneficial a manner as he and they respectively could or might have held and enjoyed the same in case this Act had not been passed." It is these words which I presume are considered (indeed, I so collect from the opinion of the learned judges) mainly to create the difficulty; because, it is said, they treat it as a mere seignorial right, and indicate, as it is thought, that nothing else was meant to be given, but something which had existed as a seignorial right before the passing of the Act. Now, I confess that I cannot come to that determination.

I am very glad that the form in which the case was put for the opinion of the learned judges raises what is the real question, namely, that there was no other right than the right which arose from the Defendant in Error being the owner of the soil. But, looking strictly at the case, it states, that this was a seignorial right, because it expressly states, "that Sir *James Graham*, as such lord, was entitled, amongst other things, to the right of hunting, shooting, fishing, and fowling." Therefore, if it was taken upon the statement of the case, there could be no doubt that this was a seignorial right. But, in truth, it evidently was no seignorial right. But the Act of Parliament states, that there were certain privileges which he enjoyed as lord. The case shows us what was meant by that, and my opinion is, that we are giving effect to the real intention of the parties, and to the true construction of the Act, by holding, that what was meant to be given or reserved to Sir *James Graham* was the *de facto* right of sporting which he enjoyed, from whatever source that right arose. I, therefore, think that the judgment ought to be for the Defendant in Error.

Lord *Wensleydale*:

My Lords, I entirely agree with my noble and learned friends, that the judgment ought to be for the Defendant in Error. I entirely adhere to the opinion which I gave in the Court of Exchequer, in which all of us concurred, that in this case there is a reservation of the *de facto* right to Sir *James Graham*. The only part of that judgment as to which I have any doubt is, whether this case can be distinguished from the case of *Greathead v. Morley*; but I adopt the alternative of my noble and learned friend opposite, that either it can be satisfactorily distinguished, or that the decision is wrong.

Judgment of the Exchequer Chamber affirmed.

Lords' Journals, 5 July 1859.

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GEORGE CHASEMORE - - Plaintiff in Error.

HENRY RICHARDS - - Defendant in Error.

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THE principles which regulate the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.

Where, therefore, *A.* a landowner and a millowner who had for above 60 years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining owner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water:

Held, that *A.* had no right of action.

(*Dickinson v. The Grand Junction Canal Company*. 7 Exch. Rep. 282 questioned.)

THIS was a proceeding in Error on a judgment in the Court of Exchequer Chamber. The Plaintiff was a mill-

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owner near *Croydon*; the Defendant, the clerk of the Local Board of Health of that town, in which character he was sued.

The declaration stated, that the Plaintiff was possessor of an ancient mill, with the appurtenances, and was entitled to the flow of a certain stream, called the *Wandle*, for the purpose of working, using, and more conveniently enjoying the said mill, and that the said board wrongfully abstracted and prevented the flow of and diverted the water of the said stream away from the said mill, and wrongfully abstracted and prevented and intercepted the flow of and diverted water which ought to have flowed into the said stream and mill, and continued to abstract, prevent, divert, and intercept the same respectively, by digging and sinking a well near to the said stream, and taking the water of such well.

The Defendant pleaded, not guilty, by statute. The statute stated in the margin was 11 & 12 Vict. c. 63, s. 139, a public Act. Upon this plea issue was joined.

The cause came on for trial at the *Kingston* assizes in *March* 1854, before Mr. Baron *Alderson*, when a verdict was entered for the Plaintiff, subject to the award of Mr *Creasy*, with power to him to state a special case for the opinion of the Court. A case was stated, and the following are the material facts set forth in it:—

“The Plaintiff is, and at the time of the acts complained of was, possessed of and was the occupier of an ancient mill on the river *Wandle*, in the county of *Surrey*, called *Waddon* Mill, situate about one mile from the town of *Croydon* in the said county.

“The Plaintiff, and the preceding possessors and occupiers of the said mill, had, for upwards of sixty years next before the acts of the local board hereinafter mentioned and for upwards of sixty years next before the bringing

of the action, used and enjoyed as of right, and been entitled to use and enjoy the flow of the said river for the purpose of working and using the said mill.

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“The river *Wandle* commences, and always has commenced its course near the part of the town of *Croydon* which is nearest to the said mill, and the said river flows and always has flowed thence to and by the Plaintiff’s mill.

“The river *Wandle* is, and always has been, fed and supplied above the Plaintiff’s mill by (among other sources of supply) the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of *Croydon* and its vicinity.

“Large quantities of this water sink into the upper ground to various depths, and then flow and percolate through the strata towards and to the river *Wandle* (if not interfered with), in some instances rising to the surface as springs, and then flowing as little surface streams into the river; in other instances finding their whole way underground into the river. The precise lines and courses in which the underground runlets and particles of water so find their way underground towards and to the river vary continually and infinitely with the shiftings and variations in the soil which occur from natural causes, but the general flow of large quantities of water to the river *Wandle* is as above described; and if they are not interfered with or intercepted, they form considerable sources of supply to the river, as well above as below the Plaintiff’s mill.

“It is impossible to know beforehand the precise or complete effect which the sinking a new well, and pumping from it in any part of the district above described, may have upon springs or streams in the vicinity; the effect may be instantly sensible and considerable, or for a long time no sensible effect may appear; but the

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natural effect of abstracting a large quantity of water at any spot of the district above described is to diminish the quantity at every other spot throughout the district, though the amount of diminution at particular spots may be infinitesimally small; and the natural effect to be reasonably expected from sinking a new well in such a district, and from continually or almost continually pumping thence large quantities of water for a long time, must be the sensible diminution of the water supply of springs and streams in the vicinity.

“The above description is to be taken to apply to the district in question, not merely at the present time, but for 60 years and upwards next before the works and acts of the Local Board of Health hereinafter mentioned, and for 60 years and upwards before the bringing of the action.

“The Local Board of Health for the town of *Croydon* was duly constituted under the ‘Public Health Act,’ and under the ‘Public Health Supplemental Act, 1849.’

“In the year of our Lord 1851, the said Local Board, for the purpose of supplying the town of *Croydon* with water, and for other sanitary purposes under the said statutes, made and sank a large well to the depth of 74 feet in their own ground, in a piece of land of and belonging to them in the town of *Croydon*, and within the district which has been above described. The distance of the said well from the commencement of the river *Wandle* is about a quarter of a mile. They also erected pumps and steam-engines on their said ground, and began to pump water from the well into a reservoir and pipes, for the supply of the town at the end of the said year, and with slight periods of intermission, have continued to do so to the present time.

“The amount of water so pumped and taken by them through and from the said well during the period of six

calendar months from the 16th of *August*, in the year of our Lord 1853, to the 16th day of *February* in the year of our Lord 1854, was between 500,000 and 600,000 gallons daily. Part of the said quantity of water so then pumped and taken by them through and from the said well, was water then flowing and finding its way underground through the strata in the manner above described, towards the River *Wandle*, and which, if not intercepted by the operation of the said well and pumping, would have flowed and found its way into the River *Wandle* above the Plaintiff's mill; but which, by the operation of the said well and pumping, was drawn away into the said well, and thence pumped up and taken by the said Local Board: and I find, as a fact, that the said Local Board did during the six months aforesaid, by means of the said well and pumping, abstract, divert, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the River *Wandle*, and would then and there, as part of the water and stream of the said river, have flowed and found its way to the said mill of the Plaintiff, and have been applicable and serviceable to and for the working thereof, and that the same was sufficient in quantity to have been of sensible value in and towards the working of the said mill.

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"And I find that the said Local Board did not, during any part of the time in question, intercept, divert, or abstract, or draw into their well, any water which had already joined the said River *Wandle* and become integral part of the same, or which had already joined and become integral part of any surface stream running into the said river.

"I farther find that the said Local Board, throughout all their acts and works hereinbefore described, were actuated by no malice against the Plaintiff or any one else, and that they did not intend in any way to diminish the quan-

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tity of water in the River *Wandle*, or to injure any person interested in the use of the said river ; but the said Board at the time of their said acts and works, and through the said period of six months particularly in question in this cause, had reasonable means of knowing the probable and natural effects of their said acts and works.

“ In considering this case, the Court is to have power to draw all inferences of fact which a jury might draw.

“ The question for the opinion and judgment of the Court is whether, under these circumstances, the said Local Board of Health is legally liable in this action to the Plaintiff for the abstraction of water as above described.”

On the 14th *May* 1856, the Court of Exchequer, acting upon the authority of *Broadbent v. Ramsbotham* (a), and without hearing any argument, gave judgment for the Defendant.

On the 12th *May* 1857, the Court of Exchequer Chamber affirmed that judgment, Mr. Justice *Coleridge* differing from the other Judges (b). On this judgment error was suggested.

The Judges were summoned, and Mr. Justice *Wightman*, Mr. Justice *Williams*, Mr. Baron *Martin*, Mr. Justice *Crompton*, Mr. Baron *Bramwell*, and Mr. Baron *Watson* attended.

Mr. *Bovill* and Mr. *Needham* (Mr. *Raymond* was with them) for the Plaintiff in Error (c).

On the facts found in the special case, the Plaintiff had a clear right to this water ; the burden of showing a jus

(a) 11 Exch. 602.

(b) 2 Hurl. & Nor. 163.

(c) There was some argument on the words of the 145 s. of the Public Health Act of 1848, 11 & 12 Vict. c. 63, under which the Defendant had acted ; but, as the judgment proceeded entirely on general law relating to rights to water, that argument is not reported.

fication for interference with this right rests, therefore, on the Defendant. The ordinary right to water is the same as the right to light and air, *Blackstone* (d); and any additional right must be established by grant or prescription. Here the Plaintiff's title is perfect, both as respects ownership of land and length of enjoyment. He is the owner of the land over which flows an ancient mill-stream, and he has been in possession of the right to use the water of that stream for above 60 years. His enjoyment of this right has been invaded by the Defendant, who takes the water, not only from land which he occupies, but from a large extent around, and entirely diverts it; so that the Plaintiff no longer has the use of it. This is an excess for which the Defendant is answerable. Each owner may have the reasonable use of water coming to his land, but the use must be confined within reasonable limits. That is the law in *England*, and it applies even in the cases on the subject of irrigable meadows.

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The first case in which a question of this sort directly arose was that of *Balston v. Bensted* (e), where Lord *Ellenborough* held that "20 years' exclusive enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it;" and there the owner of an adjoining close was held liable for cutting a drain, whereby the supply of water to a spring on the Plaintiff's land was diminished. In *Race v. Ward* (f) it was expressly decided, that the use of water issuing from a well was not in the nature of a *profit à prendre*, but was an easement; and in *Mason v. Hill* (g) it was held that an action would lie to recover damages for water diverted

(d) Comm. vol. ii. p. 14.

(e) 1 Camp. 463.

(f) 4 El. & Bl. 702.

(g) 5 Barn. & Ad. 1.

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from springs in the Plaintiff's land, and collected in a reservoir, for the possessor of land through which a natural stream flows has a right to the advantage of the stream flowing in its natural course, no adverse right having been acquired by twenty years' possession.

The law of the *United States* resembles that of *England*. Mr. Justice *Story* in *Tyler v. Wilkinson* (*h*) laid it down that "no proprietor has a right to use the water"; that is, water flowing along his own land, "to the prejudice of another;" and in Mr. Chancellor *Kent's Commentaries* (*i*), the right to the use of water is treated as that of every inferior proprietor, but that right is declared subject to the restriction that it must be a reasonable use. The same principle of reasonable use has therefore been adopted in both nations. That doctrine is, in *Embrey v. Owen* (*j*), declared to be fully established; and it is said (*k*) "the law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright v. Howard* (*l*), followed by *Mason v. Hill* (*m*), and ending with that of *Wood v. Waud* (*n*), and is fully settled in the *American* courts. *Kent's Commentaries*." There are several other

(*h*) 4 Mason's U. S. Rep. 400.

(*i*) Vol. 3, Leet. 52, pp. 439. 445. 544.—"A proprietor of lands has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land, as an incident to the land, he cannot unreasonably retain or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above, without a grant, or an uninterrupted enjoyment of 20 years, which is evidence of it."

(*j*) 6 Exch. Rep. 353.

5 Id. 1.

(*k*) Id. 368.

(*n*) 3 Exch. Rep. 748, and see *Miner v. Gilmour*, 12 Moo. P. C. Cas., 131.

(*l*) 1 Si. & Stu. 190.

(*m*) 3 Barn. & Ad. 304;

passages in the same judgment, in all of which the right of all the proprietors of land is restricted "to a reasonable enjoyment of this gift of Providence." The case of *Wood v. Waud*, there referred to, is express upon that point. All these authorities apply as much to water flowing under ground as to that which flows on the surface, and whose course is visible to all. And the doctrine thus set forth comes from the civil law. Thus in *Cujacius* (o), it is said, "Aquæ haustus, est jus prædii non personæ. Hoc vero ita procedit, si aqua hauriatur urnis, aut urceis, aut situlis aquariis, vel aliis vasibus ad aquam hauriendam accommodatis. Quid autem fiet, si aqua hauriatur machinis aut organis? Machinæ quibus hauritur aqua, hæ sunt, quæ etiam hodie sunt in usu, rota, tympanum, cochlea. Quæstio ergo legis est, quid juris sit, si aqua hauriatur his machinis;" and he goes on to say, that there may be a grant of an exclusive right to take water, but he imposes even a restriction on that. His words are, (p) "Nunc quæro an sit utilis hæc cessio. Si quis mihi cesserit ne sibi liceat in suo fundo aquam quærere. Constat vero hanc cessionem valere, quia est mihi utilis, ne scil. minuatur aqua mei fundi, nec præcedantur venæ aquariæ mei fundi aut putei." It is therefore clear that *Cujacius* doubted whether such a right could be good even in a grant, and he only inclined to think it might, if the grant was for useful, that is, necessary purposes of the grantee. Here there is neither evidence of a grant nor that the water taken is required for the use of the Defendant. Even supposing that such a grant could be good, still it must be shown to exist, and here there is no proof of that kind.

The rule to be deduced from these authorities seems to

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(o) Tit. IV., Comm. Præd.
Lib. VIII., Digest, Vol. 7 (Ed.
Naples 1758), Col. 443.

(p) Tit. I. De Servitutibus.
Same Vol. Col. 399.

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be that the owner or occupier of the land has the right to take the water flowing through it to a reasonable extent, and for purposes connected with the land through which it flows, but not otherwise. Here neither of these conditions is fulfilled by the defendant; besides which he claims to take not only the water which he finds on his own land, but likewise to draw it from all the land around him, and not for his own use merely, but to supply other people, who have no right to the water at all. Such a claim cannot be supported; it is in excess of all the principles which have hitherto governed questions of this sort. Nor does the purpose of the Defendant give him the right he claims. If the Defendant may take the water from all the land immediately around his own merely because he is about to employ it for the benefit of the town of *Croydon*, he may take it in like manner, and carry it to *London*, for the purposes of the metropolis. The case of *Dickinson v. The Grand Junction Canal Company* (q) is precisely in point here. There the company had power to make wells, and in 1849 formed a well, and pumped a quantity of under-ground water which would otherwise have gone into the river, and would have found its way to the Plaintiff's mill, but which was thus intercepted; and it was held, that an action would lie at common law against the company for the abstraction of the water, though it never had formed part of the river, whether the water was part of an underground watercourse or was merely water which had percolated through the stratum. In that case it was said (r) that when water was on the surface, the right of the owner of the land was undoubted; "and if the course of a subterranean stream were well known, as is the case with many which sink under ground, pursue for a short space a

(q) 7 Exch. Rep. 282.

(r) 7 Exch. Rep. 300.

subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed, could not maintain an action for the diversion of it if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." [Lord *Brougham*. Suppose a man sank an artesian well for his use, and got an ample supply of water, he must obtain part at least of it from what would otherwise find its way into neighbouring streams. Suppose it was like the artesian well at *Grenelle*, which affects streams for forty or fifty miles around; would every proprietor and millowner within such a circle have a right of action?] It is not necessary in this case to consider such speculative instances; here the injury and the cause of it are undoubted.

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The case of *Rawstron v. Taylor* (s) does not impeach the doctrine thus laid down. That case decided that the owner of land has an unqualified right, as to water coming on his land in no regular or defined course, to drain it for agricultural purposes, and a neighbouring proprietor cannot complain that he is thereby deprived of such water which would otherwise have come to his land. There the real principle was, that each proprietor had the right to deal in a reasonable manner with the water on his own land, and that though such reasonable and necessary use of it might be injurious to another proprietor, it gave no right of action. The Plaintiff does not contest that principle, and its application leaves *Dickinson v. The Grand Junction Company* entirely unshaken. Nor is it touched by *Broadbent v. Ramsbotham* (t), which likewise applies to surface water, where it was held that water which occa-

(s) 11 Exch. Rep. 369.

Jour. (N.S.) Exch. 115.

(t) 11 Exch. Rep. 602. 25 Law

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sionally flowed over land in no definite channel, though when doing so it benefited the Plaintiff, could not be claimed by him as something in which he had a fixed legal interest. Yet it was on the authority of these two cases that the judgment in the Court of Exchequer in the present case was given. [Lord *Wensleydale*. I did not take part in that judgment; I had left the Court before it was delivered. I imagined there was a definite stream which fell into the basin, and that an action would lie for interrupting that stream. My learned brothers did not think there was any stream; we differed, not on any point of law, but on a point of fact]. In the report of the case in the "Law Journal" there is introduced a very important observation of Mr. Baron *Parke*, who, speaking of *Acton v. Blundell* (u), said, "This Court, and I believe all other Courts, disapprove of that part of the judgment which denies the natural right to the water. In *Wood v Waud*, it was held that there was no distinction with respect to water running under ground. For instance, there would be no right to divert the River *Mole* or the stream at *Ingleborough* (which is subterranean in a known course for a mile). *Dickinson v. The Grand Junction Canal Company*, shows the right to feeders, unless the owner's necessities require them." The Plaintiff here contends for that natural right, and admits that where there are necessities of use affecting a particular owner, the water may be taken by him for such necessary use; that is, indeed, the reasonable use which all the authorities show to be lawful; but that will not justify what has been done here.

This brings the argument down to the present case itself and it is submitted that the judgment of Mr. Justice *Coleridge* is right (v), and the judgments of the other Judges in the Exchequer Chamber are erroneous.

(u) 12 Mee. & Wels. 324.

(v) 2 Hurl. & Nor. 108, 186.

The *Attorney-General* (Sir *F. Kelly*) and Mr. *G. Miller* for the Defendant in Error :

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The substance of the Plaintiff's claim is, that after a possession of 20 years, he is absolutely entitled to all the water which he has been accustomed to use at his mill, from whatever source it is derived, whether passing through known and defined channels above the surface of the ground, or passing through unknown and undefined channels underground. But it is not denied that his claim is subject to some qualification, and that is, that every owner of land over or through which the water flows to the river is entitled to appropriate to his own use a reasonable quantity of this water. Here arises the first difficulty ; for here begins the conflict of rights of all the owners whose lands are on the same level. It is admitted that each owner has a right to the reasonable use of the water passing through his ground ; he may sink a well to supply his domestic and agricultural wants. This well produces no perceptible effect on the quantity of water that used to flow into the stream. But a great many other owners do the same, and a very perceptible effect is then produced. Is the mill-owner then entitled to his action ? And, if so, against whom ? Against all jointly, or against each ? And, if against each, against which of them, there being no possible means of telling which amongst them has caused the injury ? What is the reasonable use ? First, it is conceded that it is the necessary use of the water for domestic, and then for agricultural purposes ; but Mr. Chancellor *Kent* has been cited, and he superadds the use for manufacturing purposes (w). Is draining within the meaning of

(w) *Kent Com.* vol. III. part 4. Lec. 52, Tit. II. s. 7, p. 546.—
“Streams of water are intended for the use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes.”

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agricultural purposes? Is irrigation? if so, to what extent? Would the making of an ornamental piece of water, a lake—as in *Blenheim* Park, for example—be a reasonable use of the water? [Lord *Wensleydale*: The English cases have not yet allowed of the use of water for irrigation; the American cases do allow it. In *Embrey v. Owen* (x), an action for using the water for the purposes of irrigation failed, because the evidence showed that no injury had really been occasioned]. It has been admitted that any one man may sink a well on his own land, for his own domestic use; but it is said that the well here is sunk not for the use of the Defendant, but of a great number of other persons, and therefore, that it is in excess of the Defendant's right. But, how can that affect the question? If there are 500 proprietors, and all of them agree that, instead of each sinking a well at great individual cost and trouble, they should pay one of their number to supply them with water, the result would be precisely the same. Now, *Blackstone*, who has been already referred to, expressly states (y), that the owner of the land where the water passes has a full right to use it in its passage. Again, a man has a right to cover his land with warehouses and sheds. Suppose he uses butts and tanks to collect the rain water. By so doing, he prevents it falling on the ground, sinking in and percolating through the earth. Is his doing that to subject him to an action if the neighbouring stream is thereby affected? Or suppose, what one man does in this way should not affect the stream; but suppose, that many others did the same, and that a sensible effect was thereby produced on the stream, would an action then lie, and if so, against whom? In insisting on a title to the water after more than a 20 years' possession

(x) 6 Exch. Rep. 353.

(y) 2 Comm. p. 14.

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the Plaintiff is setting up a prescription on his own land, which he cannot do, *Cooper v. Barber* (z). That case was referred to by Lord Chief Justice *Tindal*, in judgment in *Acton v. Blundell* (a), to show that that which is unknown to a man, and therefore unnoticed by him for above 20 years, cannot be made ground of prescription against him. The argument for the Plaintiff requires the House to hold the reverse, and to say, that though no one knew of this underground water, the exclusive benefit of which the Plaintiff claims, yet his use of it, after it had found its way into the stream for above 20 years, is to found a prescription in his favour.

There are but two cases which bear directly on the point now under consideration; they are *Acton v. Blundell* (b) on the one side, and *Dickinson v. The Grand Junction Canal Company* (c) on the other. *Rawstron v. Taylor* (d), and *Broadbent v. Ramsbotham* (e), though important, are only of inferior importance. As to *Dickinson v. The Grand Junction Canal Company*, it is clear that the Judges in the Exchequer could not have meant to decide the question now before this House; for, in that event, that Court has now pronounced opposite decisions on the same point. If that is so, then the latter must be taken as overruling the former. The question there really depended on this: whether the Company had violated the local Act of Parliament, and its own agreement made in 1817, and the answer was in the affirmative; but the judgment (f) shows that the water then spoken of was not underground water, but water which had reached the surface, and was flowing in a defined and well-known channel. Then, what is the

(z) 3 Taunt. 99.

(a) 12 Mee & Wels. 352.

(b) 12 Mee. & Wels. 324.

(c) 7 Exch. Rep. 282.

(d) 11 Exch. Rep. 369.

(e) Id. 602.

(f) 7 Exch. Rep. 301.

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case of *Acton v. Blundell* (g), where the question now before the House really was discussed. That case establishes the doctrine of the absolute right of the owner of land through whose land water percolates, to use that water. The law, civil and English, with relation to underground water, was there distinctly under discussion; and where *Marcellus* was there quoted (h), for the purpose of showing that the civil law did not admit such a right, Mr. Justice *Maule* observed, that the true translation of the observation of that writer was, that “If a man digs a well in his own field, and thereby drains his neighbour’s, he may do so, unless he does it maliciously;” and when Lord Chief Justice *Tindal* delivered the judgment of the Court (i), he said, “The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface.” That is the question now before the House. His Lordship afterwards said, that if the right to be enjoyed was to be governed by the same law, then the Defendants could not justify the making of coal-pits; “but we think there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.” The reasons given for the difference are most strongly set forth, and they depend on this: that while as to streams flowing on the surface everything about them is known, there is an absolute impossibility for anyone to know what are the underground currents, where they begin, what they produce, and in what direction they run, and consequently an absolute impossibility of knowing what are the rights in relation to them. The question,

(g) 12 Mee. & Wels. 324.

(i) 12 Mee. & Wels. 348.

(h) Id. 335.

therefore, is not now brought for the first time to a Court for decision. It has already been fully considered and decided; that decision, pronounced several years ago, has never been questioned, it is right in principle, and it fully justifies the all but unanimous judgments of the Judges in this case.

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Mr. *Bovill* in reply :

The passage quoted on the other side from *Kent's Commentaries* (j), expressly declares that the use of the water for domestic, agricultural, and manufacturing purposes must "be made under the limitations which have been mentioned." Those limitations show that it must be a reasonable use, and such a use as is required for the purposes of the owner of the land; and especially it is not to be used "so as to destroy or render useless, or materially diminish, or affect the application of the water by the proprietors above or below on the stream." The civil law authorities are referred to in *Acton v. Blundell*, and they establish the general proposition for which the Plaintiff contends.

The *Lord Chancellor* (Lord *Chelmsford*) proposed for the opinion of the Judges the following question:—"Whether, under the circumstances stated in the printed case, the *Croydon* Local Board of Health is legally liable to the action of the Appellant for the abstraction of the water in the manner described?"

Mr. Justice *Wightman* delivered the opinion of the Judges who had been present at the argument :

11 June.

My Lords, in this case the Judges agree in opinion. I have, therefore, to deliver their unanimous opinion to your

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Lordships. It appears by the facts that are found in this case, that the Plaintiff is the occupier of an ancient mill on the River *Wandle*, and that for more than sixty years before the present action he and all the preceding occupiers of the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the River *Wandle* is, and always has been, supplied, above the Plaintiff's mill, in part, by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of *Croydon* and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the River *Wandle*, part rising to the surface, and part finding its way underground in courses which continually vary. The Defendant represents the members of the Local Board of Health of *Croydon* who, for the purpose of supplying the town of *Croydon* with water, and for other sanitary purposes, sank a well in their own land in the town of *Croydon*, and about a quarter of a mile from the River *Wandle*, and pumped up large quantities of water from their well for the supply of the town of *Croydon*; and by means of the well and the pumping the Local Board of Health did divert, abstract, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the River *Wandle*, and so to the Plaintiff's mill; and the quantity so diverted, abstracted, and intercepted was sufficient to be of sensible value towards the working of the Plaintiff's mill. The question is, whether the Plaintiff can maintain an action against the Defendant for this diversion, abstraction, and interception of the underground water.

The law respecting the right to water flowing in definite, visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated

in the judgment of the Court of Exchequer in the case of *Embrey v. Owen* (*k*). But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall. The inapplicability of the general law, respecting rights to water, to such a case, has been recognised and observed upon by many Judges whose opinions are of the greatest weight and authority. In the case of *Rawstron v. Taylor* (*l*), Baron *Parke*, in the course of delivering judgment, says, "This is the case of common surface water flowing in no definite channel, though contributing to the supply of the Plaintiff's mill. The water having no definite course, and the supply not being constant, the Plaintiff is not entitled to it. The right to have a stream running in its natural direction does not depend upon a supposed grant, but is *jure naturæ*."

In delivering the judgment of the Court of Exchequer in the subsequent case of *Broadbent v. Ramsbotham* (*m*), Baron *Alderson* observes, that "all the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which it falls from dealing with it as he may please, and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel. There is here no watercourse at all."

In the earlier case of *Acton v. Blundell* (*n*), the Court of Exchequer was of opinion that the owner of the surface might apply subterranean water as he pleased, and that

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(*k*) 6 Exch. Rep. 353.

(*l*) 11 Exch. Rep. 382.

(*m*) 11 Exch. Rep. 602. 615.

(*n*) 12 Mee. & Wels. 324.

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any inconvenience to his neighbour from so doing was *damnum absque injuriâ*, and gave no ground of action.

There is no case or authority of which I am aware that can be cited in support of the position contended for by the Plaintiff, or in which the right to subterranean percolating water adverse to that of the owner of the soil came in question, except the nisi prius case of *Balston v. Bensted* (o) and *Dickinson v. The Grand Junction Canal Company* (p).

In the first of these cases, Lord *Ellenborough* is reported to have expressed an opinion that twenty years' enjoyment of the use of water in any manner afforded an exclusive presumption of right. This opinion amounted only to the dictum of an eminent Judge, followed by no decision upon the point, for the case ended in the withdrawal of a juror, and is directly at variance with the judgment of the Court of Exchequer in the other case, upon which the Plaintiff relies, of *Dickinson v. The Grand Junction Canal Company*, in which the Court declared (q) "that the right to have a stream running in its natural course is *not* by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land."

In the case of *Dickinson v. The Grand Junction Canal Company*, the very question now before your Lordships' House arose, and that case is relied upon by the Plaintiff as a decisive authority in his favour. The Court of Exchequer was of opinion that the company, by dig

(o) 1 Camp. 463.

(q) Id. 299.

(p) 7 Exch. Rep. 282.

pumping out the water, and so intercepting and underground and percolating water which would have gone into a stream which flowed to the mill, and was applied to the working of it, had liable to an action for the infringement of a right on law. In the same judgment, however, the *fers* (r), to the case of *Acton v. Blundell* appears with approbation, and observes, "that the existence of underground water is generally unknown before it is made; and after it is made there is a difficulty in knowing, certainly, how much, if any, of the water is made, when the ground was in its natural state, before the owner in right of his property in the soil, and the water which much belonged to his neighbour. These practical considerations make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters." But the Court, in all adverting to this distinction which it had treated the case of underground percolating water as governed by the same rules as would obtain in the case of streams and watercourses above ground; and no comment was made or reason assigned by the Court in arriving at a conclusion which not only does not follow from the premises previously adopted, but is hardly consistent with them. The Plaintiff in *Acton v. Blundell* was held to have a cause of action, independently of the infringement of a right at common law, by reason of the existence of an agreement between the parties and of an Act of Parliament; and a decision upon the right at common law seems not to have been necessary for determining the result between the parties. These considerations greatly affect the effect of the case of *Dickinson v. The Grand*

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Junction Canal Company, as an authority against the Defendant upon the point now in question, but it is an authority in his favour to show that a right to water is not by presumed grant from long acquiescence, but, if it exists at all, is *jure naturæ*, and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable to the case of waters percolating underground.

In such a case as the present, is any right derived from the use of the water of the River *Wandle* for upwards of twenty years for working the Plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the Plaintiff's mill would be affected by any water percolating in and out of the Defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickinson v. The Grand Junction Canal Company*, expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturæ*. If so, *à fortiori*, the right, if it exists at all, in the case of subterranean percolating water, is *jure naturæ*, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference.

The question then is, whether the Plaintiff has such a

right as he claims *jure naturæ* to prevent the Defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the River *Wandle*, and by such diminution affects the working of the Plaintiff's mill. It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the Plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the Bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way into it, had no sensible effect upon the quantity of water in the river which ran to the Plaintiff's mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and if any, which, for it is clear that no action could be maintained against them jointly.

In the course of the argument one of your Lordships (Lord *Brougham*) adverted to the *French* Artesian well at the *Abattoir de Grenelle*, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the Defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be

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intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments reached the ground, and flowed to the Plaintiff's mill. In the present case the Defendant's well is only a quarter of a mile from the River *Wandle*; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river, and increasing its quantity, to the detriment of the Plaintiff's mill. Such a right as that claimed by the Plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your Lordships' question in the negative.

Lord *Chelmsford*:

27 July.

My Lords, the question in this case is, whether the Plaintiff in Error is entitled to claim against the Defendant the right to have the benefit of the rain water which falls upon a district of many thousand acres in extent, and percolates through the strata to the River *Wandle*, increasing the supply of water in the river, and being of sensible value in and towards the working of an ancient mill belonging to the Plaintiff. The acts of the Defendant by which this underground water was interrupted and prevented from finding its way into the river, were done upon his own land.

It was conceded by the Plaintiff in argument, that a landowner had a limited and qualified right to appropriate

water, the course of which is invisible and undefined, exactly to the same extent and for the same purposes as he would be entitled to use water flowing in a defined and visible channel. This, it was contended, must be confined to a reasonable use of the water for domestic and agricultural purposes, and perhaps (it was said) according to the opinion of *Chancellor Kent*, for the purposes of manufacture also. It must farther be admitted (and appeared to be so in argument), that in addition to these direct uses to which the water may be diverted, if, in the regular course of mining operations the percolation of underground water is arrested in its progress, and prevented reaching a point where it would have increased a supply which had previously been usefully employed by an adjoining landowner, he can maintain no action for the loss of the water thus cut off from him. A distinction was suggested between such a use as the one last mentioned, where the interception of the water was merely the consequence of operations upon a party's own land, and the present, where the very end and object of the act done was to collect and appropriate the water. And upon the state of things existing in this case, a farther distinction was insisted upon between a party sinking a well in his own land for domestic, or agricultural, or manufacturing purposes, and a public Board or a Water Company doing the same thing for sanitary purposes, or for supplying the inhabitants of the neighbourhood with water.

Before, however, the Plaintiff can question the act of the Defendant, or discuss with him the reasonableness of the claim to appropriate this underground water for these purposes (whatever they may be), he must first establish his own right to have it pass freely to his mill, subject only to the qualified and restricted use of it, to which each owner may be entitled through whose land it may make

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its way. It seems to me that both principle and authority are opposed to such a right.

The law as to water flowing in a certain and definite channel, has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Lord Chief Baron *Pollock*, in *Dickinson v. The Grand Junction Canal Company (s)*, "that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground." But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by draught, it flows on in the same ascertained course, and the use which every owner

(s) 7 Exc. Rep. 300, 301.

may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend?

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In this case, the water which ultimately finds its way to the River *Wandle* is strained through the soil of several thousand acres. Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants? For, with Mr. Justice *Coleridge*, I do not see here "how the ignorance" which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, "is material in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in the case of a servitude, but out of the nature of the thing itself" (t).

This distinction between water flowing in a definite channel, and water whether above or underground not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities and in uncertain directions, depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument. In *Rawstron v. Taylor* (u), it was held that, in the case of common surface water rising out of springy or boggy ground, and flow-

(t) 2 Hurl. & Nor. 191.

(u) 11 Exch. Rep. 369. 382.

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ing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of the Plaintiff's mill. And in *Broadbent v. Ramsbotham* (v), it was decided that a landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a brook, the stream of which had for more than 50 years worked the Plaintiff's mill. Baron *Alderson*, in delivering the judgment of the Court in that case, says (w), "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

These cases apply to the right to surface water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description. This appears clearly to have been the opinion of Lord Chief Justice *Tindal* and the Court of Exchequer Chamber, in the case of *Acton v. Blundell* (x); for, although the Court abstained from intimating any opinion as to what might have been the rule of law if there had been an uninterrupted user for twenty years of the well of the Plaintiff, which had been laid dry by the mining operations of the Defendant, yet the *Chief Jus-*

(v) 11 Exch. 602.
 (w) Id. 615.

(x) 12 M. & W. 524. 348.

tice having prefaced his judgment by stating, that "the question argued had been in substance this, whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface," he concludes with these words (*y*): "We think that the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action."

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The Court of Exchequer, in the present case, gave judgment for the Defendants without argument, on the authority of the decision in *Broadbent v. Ramsbotham*. The Court of Exchequer Chamber affirmed that judgment, there having been only one dissentient opinion, which, however, pronounced, as it was, by a most learned and able judge (Mr. Justice *Coleridge*), is certainly entitled to the highest respect. The Judges, of whose assistance your Lordships have had the advantage, have been unanimous in their agreement with the judgment of the Court of Exchequer Chamber.

Against this concurrence of authority, what is there to

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be opposed in favour of the Plaintiff, but the *nisi prius* case of *Balston v. Bensted* (z), and the case of *Dickinson v. The Grand Junction Canal Company* (a)? With respect to *Balston v. Bensted*, it does not appear that the question of the right to water percolating through the strata, as contradistinguished from water flowing in a visible stream, was ever presented to Lord *Ellenborough*'s mind, as it is stated, that the defence was intended to be set up, but that he observed, early in the trial, that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it. Whether, by the words, "in any particular manner," his Lordship meant to point to the right claimed in that case, or intended to state a proposition applicable to all water of which there had been a twenty years' enjoyment, from whatever source it might be derived, it is impossible to gather from the report; but the question was never argued; and as, upon proof that the decrease of the water in the Plaintiff's bath had been occasioned by the operations in the Defendant's quarry, the case was at once referred, it can hardly be urged as any authority at all upon a point of such importance, and which requires so much consideration as that which it is supposed to have decided.

With respect to the case of *Dickinson v. The Grand Junction Canal Company*, upon which the Plaintiff also relied, after the observations made upon it by Mr. Justice *Cresswell* in the Exchequer Chamber, and by Mr. Justice *Wightman* in delivering the opinion of the Judges to this House, it is unnecessary for me to say more than that I entirely agree with them, and think that it can hardly be regarded as a satisfactory decision upon the point now

(z) 1 Camp. 463.

(a) 7 Exch. Rep. 282.

consideration. It appears to me, that reason and
e, as well as authority, are opposed to the claim of
ntiff to maintain an action for the interception of
erground water which would otherwise haveulti-
ound its way to the River *Wandle*, and that, there-
e judgment of the Court of Exchequer Chamber
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rd *Cranworth* :

ords, I shall not trouble your Lordships by adding
an a very few words to what has fallen from my
d learned friend, concurring as I do entirely in the
ous opinion delivered by the learned Judges who
your Lordships at the hearing of the argument,
he view taken by my noble and learned friend.

ight to running water has always been properly de-
as a natural right, just like the right to the air we
; they are the gifts of nature, and no one has a right
priate them. There is no difficulty in enforcing that
ecause running water is something visible, and no
interrupt it without knowing whether he does or
do injury to those who are above or below him.
e doctrine could be applied to water merely per-
as it is said, through the soil, and eventually
some stream, it would be always a matter that
equire the evidence of scientific men, to state
or not there had been interruption, and whether
ere had been injury. It is a process of nature not
, and therefore such percolating water has not
the protection which water running in a natural
on the surface has always received. If the argu-
the Plaintiff were adopted, the consequence would
every well that ever was sunk would have given
ight give rise, to an action.

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It is said that, in this case, this is not a well sunk by a particular individual, for his own purposes, but a great well which has been sunk, and by which water is raised to a very enormous extent for supplying the whole town of *Croydon*. That argument does not affect my mind at all, because if it be conceded, as I think it must be conceded, that each and every one of the individuals residing upon this area might have sunk a well of his own to supply himself, it seems to me to be exactly the same thing whether the water is abstracted by one large well, which supplies the whole community, or by a thousand small wells, by which each individual of the community supplies himself. In truth, I should think that, in all probability, the loss of water would be much greater by each individual sinking a well than by one great well being sunk for the supply of the whole community.

My Lords, upon these short grounds, I entirely concur with my noble and learned friend. I think the Judgment of the Court of Exchequer Chamber ought to be affirmed.

Lord *Wensleydale* :

My Lords, this case is of the greatest importance, and requires the most full and attentive consideration. No question that has occurred in my time has been so worthy of the most careful examination ; and though we have had a very able argument at the Bar from the learned counsel, and we also have been favoured with the able and unanimous opinion of six of the Judges, pronounced by Mr. Justice *Wightman*, I must own, speaking for myself, I should still desire farther discussion, as I have felt very great difficulty in coming to a conclusion satisfactory to my mind ; so many difficulties present themselves on both sides.

As, however, my noble and learned friends who heard

e argued at the Bar have not had the same difficulty in deciding that I have, and acquiesce in the proposition of the case being now disposed of, I concur, though without very serious doubts as to the propriety of the decision at which they have arrived.

Under the opinion of the learned Judges, delivered by Justice Wightman, Baron Bramwell has had the good fortune to communicate to me one which he wrote, at the time when I suppose a difference of opinion was expected, and am much indebted to him, as the subject is discussed with much ability.

Lordships have, for the first time, to decide the question as to the rights to underground water. There are conflicting authorities; the case under appeal, and *Dickinson v. The Grand Junction Canal Company (b)*, and Lordships have to decide between them. It is stated in the Judgment in this case, delivered in the Queen's Bench Chamber, by Mr. Justice Cresswell, that the House of Exchequer had, in two subsequent cases, *Rawlinson v. Taylor (c)*, and *Broadbent v. Ramsbotham (d)*, decided differently. Those cases are said to be inconsistent with the decision in *Dickinson v. The Grand Junction Canal Company*, and virtually to overrule it. This is certainly a mistake, for having been a party to the judgments in those cases, I am sure I at least had no notion of overruling the doctrine which I had joined in laying down in the case of *Dickinson v. The Grand Junction Canal Company*, which was not decided without great consideration. In *Broadbent v. Ramsbotham*, it did not appear that any water which percolated the strata would have reached the brook; and I well recollect that, on the argu-

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Exch. 282.
Exch. 369.

(d) 11 Exch. 602. 25 Law
Jour. (N. S.) Ex. 115.

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ment, I so considered, and therefore that the Plaintiff could not recover on the ground on which the case of *Dickinson v. The Grand Junction Canal Company* was decided. The argument of Mr. Cowling, as reported in the 25 Law Journal, 122, Exchequer, which is fuller than that in the 11 Exchequer, was directed to this point. I may add, that the report is more correct than that in the 11 Exchequer, which attributes to me too limited a view of the decision in *Dickinson v. The Grand Junction Canal Company*.

The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour.

The elaborate judgment of Lord *Denman* in the case of *Mason v. Hill* (e), in 1833, reviewed most prior judgments and authorities of importance up to that date, and fully established that proposition. But former authorities, and of a very early date, when carefully considered, really left no room for doubt on this subject.

In the case of *Shury v. Pigott*, decided in 1625 (f),

(e) 5 Barn. & Ad. 1.

Palm. 444.

(f) 3 Bulstr. 339. Poph. 166.

Whitlock, Justice, laid it down that "a watercourse differs from a way or common; that it doth not begin by prescription nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted," and he observed that the course of a spring is a natural course and current, and to stop this may be a nuisance to the commonwealth, and a private wrong. And in *Brown v. Best* (g), Lord Chief Justice *Lee* is reported to have said that a watercourse is *jure naturæ*, and therefore a declaration stating merely the possession of the place through which the water used to run is good. And *Denison*, Justice, said that in natural watercourses that was the most proper mode of declaring.

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This decision in the case of *Mason v. Hill* has been followed by many others laying down the same proposition, of which *Wood v. Waud* (h) was one. *Mason v. Hill* had been preceded by the case of *Wright v. Howard* before Vice Chancellor Sir *John Leach* (i). And it was followed by *Embrey v. Owen* (j), and by *Dickinson v. The Grand Junction Canal Company* (k).

This position is also established in the *American* courts, *Tyler v. Wilkinson* (l), and sanctioned by the best writers of the highest authority, *Kent's Commentaries* (m). And it is laid down as the first proposition in the very able treatise on watercourses by Mr. *Angel*, an *American* authority (n). And it has been held in *America* that the law implied damage from the violation of the right, vide *Angel on water* (o), *Pastorius v. Fisher* (p); a matter which has

(g) 1 Wils. 174.

(h) 3 Exch. Rep. 748.

(i) 1 Si. & Stu. 190.

(j) 6 Exch. 353.

(k) 7 Exch. 282.

(l) 4 Mason U. S. Repts. 400.

(m) Vol. 3, Lect. 52, p. 439-455.

(n) pp. 1. 21, 22.

(o) Id. 98.

(p) 1 Rawle. Pennsylvania Reports, 27.

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been sometimes doubted, though probably without sufficient reason.

We may consider, therefore, that this proposition is indisputable, that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, or presumed grant. And the expressions used by Mr. Justice *Bayley* in *Williams v. Morland* (*q*), and by Lord Chief Justice *Tindal* in *Liggins v. Inge* (*r*), that water flowing in a stream is *publici juris*, and the property of the first occupier, are founded on a mistake between the property in the water itself and the right to have its continual flow.

The observations, also, of Lord Chief Justice *Tindal* in the case of *Acton v. Blundell* (*s*), and of Mr. Justice *Maule* in *Smith v. Kenrick* (*t*), as to the origin of the right to the continual flow of a superficial stream, being the presumed acquiescence of the proprietors above and below, and which is the foundation of the distinction made by the Lord Chief Justice between those streams and subterranean watercourses, cannot be supported.

Now the right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right *ex naturâ*, and an incident to the land itself, as a beneficial adjunct to it, as was determined in the case of *Wood v. Waud* (*u*).

If the River *Wandle* in this case had been supplied by natural streams flowing into the river above ground, or in known definite channels below ground, the cutting off those streams to which the person entitled to the use of the river was entitled *ex naturâ* as feeders of the river, would be an

(*q*) 2 Barn. & Cres. 910.

(*r*) 7 Bing. 682.

(*s*) 12 Mee. & Wels. 324.

(*t*) 7 Com. Ben. 515.

(*u*) 3 Exch. Rep. 748.

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injury to him, and give a right of action. And if this be true with regard to underground streams finding their way into the river, then comes the difficulty how to distinguish the smaller rivulets, and the drops of water which flow and percolate into and supply the river. They are all equally the gifts of nature for the benefit of the proprietors of the soil through and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil, any more than the property in the water of a river which flows through it on the surface.

In *Acton v. Blundell* it is said by Lord Chief Justice *Tindal*, that the case "rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that he finds to his own purposes, at his free will and pleasure." If this applies to water underground in a natural course of transit, (and it must do so to be applicable at all), and not to mere stagnant water, I agree with Mr. Justice *Coleridge* in his remark, that the reason why it is, as such, more the subject of property than the water flowing above ground, is not explained (v). Surely the use of the flowing water in each case, and not the property in it, belongs to the proprietor of the surface.

As to that part of Mr. Justice *Coleridge*'s opinion in which he relies on the possession of the mill for 30 or 60 years (w), I think he is wrong. I do not think that the principle on which prescription rests can be applied; it has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty

(v) 2 Hurl. & Nor. 192.

(w) Id. 191. 193.

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years or upwards: "*qui non prohibet quod prohibere potest, assentire videtur.*" But how here could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water, in order to indicate his dissent. It is going very far to say, that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the Plaintiff. For the same reason, I dispute the correctness of Lord *Ellenborough's* opinion in the case of the spring in *Balston v. Bensted* (x), where there had been twenty years' enjoyment of it in a particular mode. The true foundation of the right is, that it is incident to the land *ex jure naturæ*.

What, then, is the distinction between superficial streams and subterranean water? With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterraneous waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbour's land of moisture, and even tap a copious spring, and pre-

(x) 1 Camp. 463.

vent it from flowing to his neighbour's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbour, especially as the precise course and direction of such water can seldom be known accurately beforehand.

In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land.

In the civil law are to be found many instances in which it is allowed to cut off subterraneous supplies, if it is done in the cultivation of the soil. In the Digest (y) it is said, "*Denique Marcellus scribit; Cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi; nec de dolo. Et sanè actionem non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*" And a very extensive sense is given to these words, authorising the improvement of the proprietor's own land, in the civil law. In the same book of the Digest (z), "*De aquâ et aquæ pluviae arcendæ,*" it is said that the making a work "*agri colendi causâ et frugum querendarum causâ,*" and thereby altering the course of the *aquæ pluviae*, is not actionable. The term "*fruges*" is said to be the same as rent, "*Frugem, pro redditu appellari, non solum quod frumentis aut leguminibus; verùm et quod ex vino, sylvis-cæduis, cretifodinis, lapidicinis, capitur.*" It would seem, therefore, that if the sources of a fountain or spring in an adjoining piece of land were cut off by excavating, in order to get the minerals in any place, it

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(y) Bk. 39, Tit. 3, Art. 1, s. iii. (z) Bk. 39, Tit. 3, Art. 1,
In Pothier's edit. vol. 3, p. 578. s. ix.

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would be deemed by the *Roman* law to fall within the principle of the improvement of the land, and not be actionable.

The case of *Acton v. Blundell* would be rightly decided upon this ground, because the injury to the Plaintiff's well was caused by the lawful exercise of the Defendant's right to get the minerals in his land; and unless he had that right, the public would have lost the benefit of a valuable gift of Providence.

We come then to the conclusion, that every man has a right to the natural advantages of his soil—the Plaintiff to the benefit of the flow of water in the river and its natural supplies, the Defendant to the enjoyment of his land, and to the underground waters on it, and he may, in order to obtain that water, sink a well. But according to the rule of reason and law, "*sic utere tuo ut alienum non lædas*," it seems right to hold, that he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be. The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, *animo vicino nocendi*. The same principle is adopted in the laws of *Scotland*, where an otherwise lawful act is forbidden "if done *in æmulationem vicini*" (a); but this principle has not found a place in our law.

The question in this case, therefore, as it seems to me, resolves itself into an inquiry, whether the Defendant exercised his right of enjoying the subterraneous waters in a reasonable manner. Had he made the well and used the steam-engines for the supply of water for the use of his own property, and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the

(a) Bell's Principles, s. 966.

families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaint. But I doubt very greatly the legality of the Defendant's acts in abstracting water for the use of a large district in the neighbourhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighbouring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the Defendant could have dug a well himself on his own land, and taken the like quantity of water, so that the Defendant may have taken much more than would have been abstracted if each had exercised his own right.

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The same objection would not apply to the abstraction of water for the use of the dwellers on the Defendant's land, even though they carried on trades requiring more water (breweries, for example) than would be used for mere domestic purposes; it would still be for their purposes only. But in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the Defendant's land.

On the whole, I should certainly have wished to give this important case farther consideration; but, as my noble and learned friends have formed their opinions upon it, I acquiesce, and do not give my advice to your Lordships to reverse the judgment.

Lord *Kingsdown* :

My Lords, I confess that I am unable to share in the doubts that have been expressed by my noble and learned friend opposite in the able and elaborate judgment which he has just delivered. I entirely concur in the opinion which has been given by the Judges unanimously in this

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case, and for the reasons by which that opinion has been supported; and I think the House is greatly indebted to those learned persons for the admirable reasoning by which they appear to have removed all doubt upon one of the most important questions that ever came under the consideration of a court of justice.

Lord *Chelmsford*:

My Lords, I ought to have mentioned, that my noble and learned friend, Lord *Brougham*, who is compelled to leave the House to-day, but who was present during the whole of the argument, entirely concurs in the opinion which I have expressed.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 27 July, 1859.

VERNON DOLPHIN - - - - *Appellant.*

T. F. ROBINS and T. PAXTON - - *Respondents.*

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 Feb. 24, 25.
 July 25, 26.
 Aug. 6.

Domicile.
Husband and
Wife.
Adultery.
Divorce.
Will.
Power.
Costs.

A foreign court cannot dissolve the bonds of an *English* marriage, where the parties are not *bonâ fide* domiciled in the foreign country.
Qu. Even if they are?

The law is the same under the 9 *Geo.* 4, c. 31, s. 22, as it was under 1 *Jac.* 1, c. 11, s. 3.

A *Scotch* Court pronounced a decree of divorce in the case of an *English* marriage, where there was no real *Scotch* domicile.

HELD, that this decree had no effect either as a divorce *à vinculo*, or *à mensâ et thoro*.

Semble, that an agreement to live separate is not equivalent in its legal effects to a judicial sentence of separation:

Qu. Whether, after a decree for judicial separation, a wife can acquire a domicile different from that of the husband?

A power was reserved to a married woman, notwithstanding coverture, by deed executed by herself, "and attested by three or more credible witnesses," to appoint.

Qu. Whether, if she had been lawfully domiciled abroad, any exec

of the power valid by the law of the country of her domicile, not in compliance with the express terms of the power, would have been sufficient?

B. were married in *England* in 1822; they lived together till 1854, when they separated. In *February* 1854 the husband went to *Scotland*, and resided there, with some very short intervals, till *June* 1854. In *June* 1854, his wife, who had followed him to *Scotland*, sued out, in the *Scotch* courts, a process for dissolution of marriage, on account of adultery committed by him in *Scotland*. In *July* a decree for divorce *à vinculo* was pronounced. In *September* she married a *Frenchman* (according to the forms required by *Scotch* and by *French* law), and went with him to his domicile in *France*. While in *England* she had executed an *English* will in pursuance of a power reserved to her, and in accordance with the terms of that power. After having resided nearly two years in *France*, she executed, in *June* 1856, a holograph will (valid according to the laws of that country) revoking all previous wills: (sustaining the judgment of the Court of Probate), that there had not been any change of domicile by the husband, *A.*; that the domicile of *B.*, the wife, was that of her husband; that the *Scotch* decree of divorce had no effect; that she continued to be a married woman and a domiciled *English* woman; and that consequently the will of 1854 was properly admitted to probate, and the revoking will of *June* 1856 was a nullity.

There had been faults on both sides, the dismissal of the appeal against the decree of the Probate Court was ordered, without costs.

There was an appeal against an order made by Sir C. Cresswell, the Judge of the Probate Court, on the 5th of *March* 1858, by which he rejected a responsive allegation made by the present Appellant, in a suit which the Appellants had instituted to obtain probate of the will of *Ann Dolphin*, otherwise *Marie Eustelle de Pontés*, deceased.

On the 15th of *July* 1822, in contemplation of a marriage between *Mary Ann Payne* and *Vernon Dolphin*, a will was executed, by which *Dolphin* covenanted to settle on her inheritments, therein described, to the uses of the marriage. This marriage was celebrated on the next day at *George's, Hanover-square*.

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On the 1st of *April* 1823, indentures of lease and release were executed in pursuance of this covenant, by which certain manors were settled in trust for securing to *Mary Ann Dolphin* 200 *l.* a year for her separate use during the joint lives of the Appellant and herself, with remainder to secure her 700 *l.* a year if she should survive the Appellant, and, after certain specific limitations, with remainder to the Appellant, his heirs, &c. One child was born of this marriage, but it died shortly after its birth. In 1839 differences arose, and the two parties agreed to separate. By a deed of trust executed on the 15th of *November* 1839, in pursuance of a family arrangement, certain estates were settled on trusts therein described, after satisfying which the trustees were to pay the surplus to *Mary Ann Dolphin* for life for her separate use, or to such persons as she should, notwithstanding coverture, appoint; and in case of her dying during the life of the Appellant, then on trust for such purposes as, notwithstanding coverture, she should by any deed, with or without the power of revocation, duly executed, and attested in the presence of two or more credible witnesses, or by her last will, direct; and in default of such direction, in trust for the Appellant, his executors, &c. A similar power was given to her with regard to other estates not previously mentioned.

On the 11th of *April* 1854, Mrs. *Dolphin* (then residing in *England*), in exercise of the power reserved to her under the deed of 1839, made a will, executed according to the forms required by that deed, by which she appointed *Robinson* and *Paxton* her executors, with directions to sell all the estates over which she had power to direct a sale, and (after setting apart 12,000 *l.* for the purposes there mentioned, some of which were trusts for her husband's benefit) to stand possessed of the monies thereby obtained upon various trusts therein set forth: "And as to the

rest, residue, and remainder of the monies to arise and be received by the means aforesaid, I give and bequeath the same unto my true and best friend, General *Amedée Davéziés de Pontés*, commandant at *La Rochelle*, in *France*, his executors, &c., whose wrongs I in this my will declare were not wilfully caused by me, and that both he and myself are the victims of cruel deception and injury." By a codicil executed on the same day she revoked the direction contained in the will as to the 12,000 l., "and all the trusts declared by the will of the said sum," and all the gifts thereby made in favour of her husband.

These papers were the will and codicil tendered for probate by the executors.

The Appellant opposed the reception of these papers, and tendered a responsive allegation, which was afterwards amended, and in its amended state set forth, "that in the month of *February* 1854 the said *Vernon Dolphin*, the then husband of the party deceased in this cause, left *England*, and went to *Scotland*; that on the 23rd day of *February* 1854 he arrived at *Edinburgh*, and from such time until the 25th of the said month he resided at the *Waterloo Hotel* in *Edinburgh* aforesaid, when he left the said hotel, and from such time until the 3d day of *April* following he resided at a cottage called *South Cottage*, which he had hired as a residence, at *Wardie*, near *Edinburgh*; and that on the said 3d day of *April* he returned to the said *Waterloo Hotel*, where he resided until the 9th of the said month, when he left the said hotel, and went to *England* for a few days, and returned to *Scotland*, and resided again at *Edinburgh* and *Stirling*, in *Scotland*, until the 6th day of *June* following, when he again returned to and took up his abode at the said hotel, and there remained till the 19th of the said month; that the said *Vernon Dolphin* had by such residence, and in inten-

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tion as well as in fact, become a domiciled *Scotchman*. That the party deceased in this cause having ascertained that the said *Vernon Dolphin* was living in adultery during the said time in *Scotland*, on the 17th of the said month of *June* a summons was personally served upon the said *Vernon Dolphin*, at her instance, in an action of divorce before the Lords of the Court of Council and Session in *Scotland*, against her then husband, the said *Vernon Dolphin*, on the ground of adultery. That on the 19th day of the said month of *June* the said *Vernon Dolphin* again went to *England*, but returned afterwards to *Scotland*, and was there resident for some days in the month of *July*, 1854. That on the 20th day of the said month of *July* the said Lords of the Court of Council and Session in *Scotland*, by their decree, dated the 20th day of *July* 1854, found the said *Vernon Dolphin* guilty of adultery, and therefore divorced and separated him from the said *Mary Ann Payne* or *Dolphin*, her society, fellowship, and company, in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband, and that the said *Mary Ann Payne* or *Dolphin* was entitled to live single, or marry any free man, as if she had never been married to the said *Vernon Dolphin*, or as if he were naturally dead. And the party proponent expressly alleges and propounds, that by such decree the said *Mary Ann Payne* or *Dolphin* became and was, from and after the said 20th day of *July* 1854, absolutely divorced from the bond of matrimony with the said *Vernon Dolphin*, and free to marry any other man.

On the 8th *October* 1854 (all the forms of the *Scotch* and of the *French* laws having been complied with) she was married to General *de Pontés*, a Frenchman, and immediately afterwards went with him to reside in *France*. In 1855 she became a member of the Roman-catholic church, and took the names of *Marie Eustelle Davézié*

des Pontés. On the 3d *April* 1856, she made a will, valid according to the *French* law, by which she appointed General *de Pontés* her "universal legatee," and General *Korte* sole executor. She was shortly afterwards placed by *De Pontés* in the convent of *Les Dames Augustines*. On the 23d *June* 1856 she made a holograph will, valid by the *French* law, in these words, "I revoke all previous wills made by me up to this date, 23d *June* 1856," and enclosed this revocation in an envelope, on which was written the following memorandum, "Last will which I have made this day, 23d *June* 1856," and signed her recently adopted names in full to each paper. These papers she entrusted to an intimate female friend, and she died in *September* 1856. These were the papers which the Appellant proposed by his responsive allegation, to bring before the Court, as the last will of the deceased, contending that by the *Scotch* divorce, and the subsequent marriage, and the residence in *France*, she had acquired a *French* domicile, and was entitled and of capacity to make a French will, and that this last will was valid by the laws of *France*.

The case was heard before Sir *C. Cresswell*, who, on the 5th *March* '1858 (a), made an order rejecting the responsive allegation. The learned Judge (as the order was interlocutory) granted leave to appeal, and this appeal was then brought.

The *Solicitor-General* (Sir *H. Cairns*) and Dr. *Deane* (Dr. *Twiss* was with them), for the Appellant:

There are three questions here: First, whether, under circumstances such as exist here, the case of *The King v.*

(a) The case had been previously heard, but the responsive allegation was sent back to be amended, as it did not sufficiently state the facts to raise the question of the *Scotch* domicile.

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Lolley (*b*) is to be held to apply, and the *Scotch* divorce and subsequent *Scotch* marriage to be held altogether invalid? Second, is not that case affected by the repeal of the statute (1 *Jac.* 1, c. 11) on which the prosecution there proceeded, and by the altered wording of the present statute (9 *Geo.* 4, c. 31) (*c*) now in force on this subject? Third, supposing the *Scotch* divorce to be invalid as a divorce *à vinculo*, is it not sufficient, as a divorce *à mensâ et thoro* to warrant the argument that she had, and was entitled to have, a separate domicile from that of her husband?

The will made in *June* 1856 is valid by the law of *France* if the person making it was at that time lawfully domiciled there. The Appellant contends that she was so. The facts set forth in the responsive allegation show that

(*b*) *Rus. & Ry.* 237.

(*c*) The 1 *Jac.* 1, c. 11, s. 1, reciting, that “forasmuch as divers evil-disposed persons, being married, run out of one county into another, or into places where they are not known,” and then marry other persons, their first husband or wife being alive, enacts that such offence shall be felony, punishable with death, and the crime may be tried in the county where the offender is apprehended. The Act (s. 2) shall not extend to cases where the husband or wife shall remain abroad, or shall not be known to be living during that time; nor (s. 3) “to any person or persons that are or shall be at the time of such marriage divorced by any sentence in the Ecclesiastical Court”

The 9 *Geo.* 4, c. 31, repealed the previous statute, and enacted (s. 22), “That if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in *England* or elsewhere,” such person shall be guilty of felony, &c. : “Provided always, that nothing herein contained shall extend to any second marriage contracted out of *England* by any other than a subject of His Majesty;” or to any person absent, and not known to be living within seven years; “or to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.”

in 1854 the Appellant was domiciled in *Scotland*, and consequently the *Scotch* Court had jurisdiction in the matter. *Conway v. Beazley* (*d*) is not an authority adverse to the Appellant, for there no *Scotch* domicile had been acquired. *Somerville v. Somerville* (*e*) is equally inapplicable, because that was a mere question which of two domiciles was to prevail. The case of *The King v. Lolley* (*f*) is relied on by the Respondents, but it is not an authority here, for that case proceeded entirely on the statute of *James I*, which statute was passed before the Union, and *Scotland* was then a foreign country. The 3d section enacted that "nothing herein contained shall extend to any persons that are or shall be at the time of such marriage" (that is, the second marriage) "divorced by any sentence in the Ecclesiastical Court." That case decided that the Ecclesiastical Court spoken of in the Act must be one existing within the limits wherein the Act itself was in force. As it was an *English* Act, and had no force in *Scotland*, the Courts there could not be intended. *Tovey v. Lindsey* (*g*) was a case in which the domicile of the parties appeared to be *English*, and therefore the case was remitted to the Court of Session to review the decision. *M'Carthy v. Decaix* (*h*) related to rights of property following a marriage, and not properly to the question of the validity of the divorce. These cases are, therefore, inapplicable to the present. In *Warrender v. Warrender* (*i*) the parties being, as they were here, domiciled in *Scotland*, the *Scotch* Court was held to have full jurisdiction in a suit for adultery, though the marriage had actually taken place in *England*. The argument of Lord *Brougham*, in delivering judgment in that case, completely applies here. A

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(*d*) 3 Hag. Ecc. Rep. 639.

(*e*) 5 Ves. 750.

(*f*) Russ. & Ry. 237.

(*g*) 1 Dow. 117.

(*h*) 2 Russ. & Myl. 614.

(*i*) 2 Clark & Fin. 488.

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Gretna Green marriage, though effected by *English* persons, and having the full effect of an *English* marriage might be dissolved in *Scotland*. Is a marriage, like that of Mrs. *Dolphin*, incapable of being dissolved in *Scotland* though the two parties should be resident there, and is she for ever to be incapable of contracting marriage elsewhere? Is she, as an infant would be during infancy, but would only be during infancy, under a personal incapacity, which as to her, is perpetual, and follows her everywhere? It is submitted that she is not; but that the *Scotch* Courts having jurisdiction over this matter, both the parties being resident in *Scotland*, could pronounce the sentence of divorce; and, if so, that she could marry again. This kind of question has necessarily been much considered in *America*, and Mr. Chancellor *Kent*, in his *Commentary* (j) says, "According to the decisions in the Federal Courts it may be contended that a divorce in one State judicially conducted and declared, and procured under circumstances which give the Court full jurisdiction of the cause, and of the parties, and sufficient to render the divorce valid and binding there, would be good and binding in every other State." In declaring this proposition, the writer comments on *Lolley's* case as one which cannot be sustained in principle (k). *Lolley's* case was decided on the 1 Jac. 1, c. 11; and having regard to the much more extensive words of the statute of 9 Geo. 4, c. 31, and the doubts that have been thrown upon *Lolley's* case, it cannot be held as

(j) 8 Edit., Vol. II. p. 84. Sect. 27.

(k) Mr. Chancellor *Kent* says that its authority is shaken by *Harding v. Allen*, (9 Greenleaf's Reports, 140): A decision of the Supreme Court of *Maine*, where a divorce in one State of a marriage celebrated in another was held good. But this decision appears to have been thus restricted, "so far as related to the dissolution of the marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband."

applicable to the present. In the later statute it is enacted, that the offence may be committed whether "the second marriage shall have taken place in *England* or elsewhere ;" but then there are several exceptions introduced by proviso ; the first is that of a second marriage contracted out of *England* by any other than a subject of His Majesty ; so that the Legislature was expressly dealing with foreign marriages by foreign persons, and excepted them from the provisions of the statute. Now, by the construction adopted on the other side, this person, though divorced in *Scotland*, and entitled to marry there, would be liable here to be prosecuted for that very marriage, unless the exceptive provisions saved her. That surely could not have been intended. The second of these exceptive provisions is, not knowing within seven years of the other party being alive ; and the third and fourth are, that of having been "divorced from the bond of the first marriage," or that of the first marriage having been declared null by a Court of competent jurisdiction. [Lord *Brougham* : "Divorced," in the first alternative, does not apply to "Courts of competent jurisdiction" in the second.] It is submitted that it does, and that a divorce pronounced by any Court of competent jurisdiction is sufficient. The Legislature, having clearly shown, in one part of the section, that it was dealing with foreign persons and tribunals, must have intended that they should be included in the construction of every part of the section.

The Act of *Geo. 4* cannot apply to a case where, there having been a marriage in *Scotland* or in *Ireland*, and a divorce there, the man comes to this country, and marries another woman, the first being still alive, for the proviso would there render it inapplicable, the divorce having been pronounced by a Court of competent jurisdiction. It cannot be pretended that the effect of the pro-

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viso is to be limited to a case where the divorce has been pronounced by an *English* Court. This is confirmed by the fact that the statute contains a declaration that it is not to apply to *Scotland* or *Ireland*. Suppose the petitioner in *Warrender v. Warrender* (1) had succeeded in his suit, and married again, no one can say that he would have been liable to indictment for bigamy. *Lolley's* case must therefore be considered out of the question, and with it the doctrine that an *English* marriage is not dissoluble anywhere.

But supposing this not to be valid as a decree for the dissolution of the marriage, then it is valid as a decree of separation *à mensâ et thoro*. If so, then she had a right to live where she pleased, and consequently to choose her own domicile, *Pothier* (m), *Williams v. Dormer* (n), in which it was held, that the ordinary presumption, that the wife is legally domiciled where the husband is, fails where there has been a sentence of divorce. In *Roach v. Garvan* (o), the effect of the sentence of a Court of competent jurisdiction was stated by Lord *Hardwicke*; there an *English* infant ward of Chancery, properly domiciled here, happened to be in *France* for education; at eleven years of age she was married to a *Frenchman*, aged seventeen; when the case came before Lord *Hardwicke*, he observed, "The marriage has been argued to be valid, from being established by the sentence of a Court in *France* having proper jurisdiction. If so, it is conclusive, whether in a foreign court or not, from the law of nations." Now, that was a stronger case than the present, for there the objection was one of natural personal incapacity. [Lord *Cran-*

(1) 2 Clark & Fin. 488.

(n) 2 Robertson's Ecc. Rep.

(m) Traite du Contrat de Marriage, Pt. VI., c. III., Art. 1, s. 3. Vol. 3, Œuv. Edit. 1781.

505.

(o) 1 Ves. 157

worth: If the decree cannot be supported as one of divorce, can it be supported as one of separation?]

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If the doctrine, that a *Scotch* Court has no jurisdiction over parties domiciled in *Scotland*, merely because they have contracted a marriage in *England*, is to prevail, the consequence will be, that parties may live together there in adultery with perfect impunity. In all the *Scotch* cases the *Scotch* Courts have upheld their jurisdiction where the parties have been, as they were here, domiciled in *Scotland*: *Gordon v. Pye* (*p*); *Duntze v. Levett* (*q*); *Ribblewhite v. Rowland* (*r*); and in the book where these cases are collected, it is said (*s*), that even the circumstances of the parties having married in a foreign country, and being foreigners, were of no importance, for a foreign domicile at the time implied no intention of the parties to exclude the operation and effect of a future domicile in another place. In *Geils v. Geils* (*t*), Lord *Truro* said, that he did not know what was meant by a colourable residence; if residence for a given time would change domicile, it would do so whatever might be the purpose for which it was adopted. There may be an end of the marital power over the wife: even under a deed of separation, with a covenant to allow her to live where she pleased, *The King v. Mead* (*u*), where the fact of having entered into such a deed was held to be an answer to the husband's application for a *habeas corpus* to bring up the body of the wife. In every view of the case, therefore, the revocatory will of *June* 1856 was valid, and the responsive allegation ought to have been received.

Dr. *Addams* and Dr. *Spinks* for the Respondent:

The real question is, whether at the time of her death

(*p*) Ferg. Cons. Cas. 70.

(*s*) Id. 142.

(*q*) Id. 248.

(*t*) 1 Macq. Sc. Ap. Cas. 255.

(*r*) Id. 276.

(*u*) 1 Bur. 542.

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the testatrix was lawfully domiciled in *France*. There could be no such domicile, either by the act of the second marriage, or by the intention of the parties. If not, then the will of 1854 must be admitted to probate, and the paper of *June* 1856 was properly rejected. If the *Scotch* court had no authority to pronounce a divorce, then her domicile could not lawfully be in *France*, but continued to be the domicile of her husband in *England*. Now, as to that, the authority of *Lolley's case*(*v*) is decisive. It was not questioned in the least degree in *Warrender v. Warrender* (*w*), and *Conway v. Beazley* (*x*) was decided in conformity with it, a conformity all the stronger from the fact that it was adopted after consideration and discussion. *Geils v. Geils* (*y*) does not in the least degree affect the principle laid down in *Lolley's case*: in *Brook v. Brook* (*z*) it was expressly acted on. The *Scotch* decree has no farther power than to authorise the parties to live separate from each other; and in the cases already cited from *Ferguson*, the *Scotch* courts did not claim an absolute right to dissolve an *English* marriage, but always carefully inquired into the domicile of the parties. Here the domicile was *English*. There had been nothing which had operated a lawful change in it, and the *Scotch* decree was therefore, even in that view, entirely unwarranted. The *Scotch* decree not operating as a divorce *à vinculo*, it could not operate as a divorce *à mensâ et thoro*. Like a criminal sentence, if not good for the whole, it was good for nothing. It could have no legal validity in the case of an *English* marriage, otherwise in *Lolley's case* it might have been set up as a defence to the indictment. Nor could it be good to authorise a separate domicile. *Williams v.*

(*v*) Russ. & Ry. 237.

(*w*) 2 Clark & Fin. 483.

(*x*) 3 Hag. Ec. Rep. 639.

(*y*) 1 Macq. Sc. Ap. Cas. 255.

(*z*) 3 Sma. & Gif. 481.

Dormer (a) is not in point here, for that was a mere question of practice on the admissibility of a libel, and related to residence for the purpose of citation, and nothing else. But even if the decree could have effect, as a sentence of separation *à mensâ et thoro*, it would be nothing, for that would merely dispense with their obligation to live together, but would not give them separate and opposing rights, except for the mere purpose of living separately. Thus, if a third person died during the continuance of the separation, and left a legacy to the wife, the property in it would be that of the husband, who might release the executor. *Warrender v. Warrender* (b), and *Berkhampstead v. St. Mary* (c), show that, in law, her domicile is always the husband's. In the case of *Daly's* settlement (d), the *Master of the Rolls* expressly decided, that a feme covert, living apart from her husband, has no power to change her domicile; and yet in that case the residence in *Paris* had continued undisturbed for thirty-four years. [Lord *Brougham*: In that case there was no sentence of divorce.] The husband's settlement is *primâ facie* that of the wife: *Whitcomb v. Whitcomb* (e); in which *Chichester v. Donegal*, *Shackell v. Shackell*, and *Warrender v. Warrender*, were all considered. The observation of Lord *Truro*, in *Gails v. Geils* (f), that he did not understand what was meant by a colourable residence, merely applied to this, that where there was an express declaration of an intention to change the domicile, and a residence sufficient by law to carry that intention into effect, the fact that the purpose of both was a collusive one, would not defeat or prevent the consequence of law. Even so expressed, the correctness of the expression may be doubted, but, at all events, it can have no application to the present case.

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(a) 2 Robertson, Ec. Rep. 505.

(d) 25 Beav. 456.

(b) 2 Clark & Fin. 488.

(e) 2 Curt. 351.

(c) 2 Bott. 33.

(f) 1 Macq. Sc. Ap. Cas. 255.

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If there was no valid divorce, there could be no valid second marriage, even though the parties had been domiciled in *France*; for the law of the country in which marriage is celebrated cannot give validity to that marriage, if it is prohibited by the law of the country of the domicile and allegiance of the parties: *Brook v. Brook* (g) where a marriage with a deceased wife's sister, celebrated by two *English* subjects in *Denmark*, where such marriages are valid, was held void.

The *Solicitor-General* replied.

July 26. Lord *Chelmsford*: We are all of opinion that the *Scotch* decree of divorce did not dissolve the *English* marriage; but a question has been raised, which we desire to hear argued, whether the circumstances here were not such as to render the wife capable of gaining for herself a domicile? and, if so, whether she had gained it? The argument of counsel will be confined to this point.

Sir *H. Cairns* (Dr. *Deane* and Dr. *Twiss* were with him) for the Appellant:

It must now be assumed, that acts of adultery were proved against the husband. A decree of divorce having been pronounced, all the parties were persuaded (it matters not whether erroneously or not) that there was a dissolution of the marriage. Assuming that the marriage was not dissolved by the *Scotch* decree, then the cohabitation of Mrs. *Dolphin* with *Des Pontès* was itself adulterous. Then both parties were in a state of adultery, and the first consequence of that would be, that there could be no divorce sued for on either side. [Lord *Kingsdown*: Would

divance in getting the divorce affect the question?] It is not necessary now to discuss that point; there is no divance alleged as to committing the act of adultery. *And Kingsdown*: Are the facts sufficiently brought before the Court to raise that question as the allegation now stands?] It may be assumed that they are for the purpose of the judgment, and of this appeal against it. *And Cranworth*: It cannot be doubted that, in fact, the proceeding was collusive.] Not in committing the adultery. As the facts now stand, both parties having committed adultery, neither of them could sue for a divorce, *see v. Hope (h)*, nor could either party insist on a restitution of conjugal rights. It follows, therefore, that the woman might, under such circumstances, obtain a domicile of her own. Domicile is not an unchangeable thing. *And facie* the domicile of the wife is that of the husband, and of the child is that of the father, but both may be changed by circumstances. On marriage, the wife takes the name, as she does the domicile, of the husband (i), and that state of things continues while the parties mutually perform the duties of husband and wife. When the performance of those duties has, in fact, ceased, and there can be no decree to compel the restitution of conjugal rights, and there is, besides, a decree of separation, then the purposes for which the domicile of the wife was made identical being at an end, the woman may acquire a separate domicile of her own. [Lord *Wensleydale* referred to *Domat's* "Public Law" (j)]. Mr. *Phillimore (k)* says, that after a divorce *à mensâ et thoro*, the domicile of the wife would not be that of the husband, "but the one chosen for herself after the divorce." Other exceptions to

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(i) 1 Swab. & Trist. 94.

(j) Phillim. Dom. s. 40.

(k) Vol. 2, Public Law, Book 1,

Tit. XVI. Des Communautés,
s. 3, par. 11, 13.

(l) Domicile, s. 47.

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the wife's domicile being that of the husband also exists such as those of the husband being an idiot or a madman or under an interdict. [Lord *Chelmsford*: Does not the argument suppose that residence is domicile? They are two distinct things.] The change is in the condition of the parties, not in their residence. The mere fact of the transportation of the husband would operate a change in the domicile of the wife.

The case of *Chichester v. Donegal* (1) is not an authority against this argument, for that was merely a decision on the sufficiency of a notice to found jurisdiction. The same observation applies to *Shackell v. Shackell* (m). *Warrender v. Warrender* (n), and *Geils v. Geils* (o) show that though the domicile of the husband is *prima facie* that of the wife, yet that it is not necessarily so, and that the Court will inquire whether the wife had valid reasons for leaving her husband's house. To that extent, therefore, those cases are in favour of the Appellant; and the constant repetition of the phrase, that the domicile of the husband is *prima facie* that of the wife, shows that the law recognizes the possible existence of circumstances which may authorise her to have a domicile different from that of her husband. The circumstances already referred to in this case authorise it here. This subject was discussed in a case before the Supreme Court of *Massachusetts*, *Harteaux v. Harteaux* (p), and there the Court, admitting the general rule, expressed an opinion that cases might arise in which, if a husband changed his domicile, the change might not deprive the wife of her right to sue for a divorce in the jurisdiction of the first domicile, which continued to be hers, though he had taken

(1) 1 Add. Ecc. Rep. 5.

(m) 2 Curt. 351.

(n) 2 Clark & Fin. 488.

(o) 1 Macq. Sc. Ap. Cas. 255.

(p) 14 Pickering Rep. 181.

Story Confl. of Law, s. 229a.

another. In *Williams v. Dormer* (*q*), the ordinary presumption as to the domicile of the wife was held to fail where there had been a sentence of divorce, and the expressions in *Tovey v. Lindsay* (*r*) which fell from both Lord *Eldon* (*s*) and Lord *Redesdale* (*t*), show most decisively that the ordinary rule is not inflexible, and that a husband cannot at all times and under all circumstances draw his wife's domicile to his own.

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Here several circumstances have occurred which must have the effect of changing the domicile. The first is the marriage with *Des Pontès*, a domiciled *Frenchman*; second, the change of domicile, in fact, by going to *France*, and taking up a permanent residence with him; third, leaving a Protestant country, and becoming a Roman Catholic; fourth, changing her name; fifth, residing in the adopted country from that time to the time of her death, and making two wills according to the forms required by the laws of that country. [Lord *Chelmsford*: Her going to *France* is not evidence of her intention to change her domicile. She went independently of her own choice, believing that she was a married woman, and so following her husband.] But she knew before the marriage that *Des Pontès* was a *Frenchman*, and that *France* was his place of domicile. She married him in order to live there as the place of her choice; so that, as far as intention must be shown for the purpose of changing domicile, it was shown by her, and therefore, whether she is considered as lawful wife or not lawful wife of *Des Pontès*, her intention to make *France* the place of her domicile is equally established. The responsive allegation was framed with the view of treating the divorce and subsequent mar-

(*q*) 2 Robertson, Ec. Rep. 505.

(*s*) p. 138.

(*r*) 1 Dow. 117.

(*t*) pp. 139, 140.

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riage as valid ; but if she was entitled, on any account, to change her domicile, her acts show that she did all in her power to make the change, and she must be treated as having effectually made it.

Mr. *R. Palmer* (Mr. *Busk* was with him) for the Respondents.

The argument for the Appellant has no foundation but in the ambiguous manner in which the word "domicile" is used. Properly it is only applicable to residence, but it is frequently used as if it was applicable to determine personal status. Assume this to be a question relating to the succession to personal property, then how will the case stand ? The person here is *persona conjugata*, not a simple, but a complicated person, who is by marriage united to another ; her original character is merged by this union in that of the husband. The conjoint legal capacity of the two is represented by the husband alone. That is what is called the disability of marriage. Her real property is not vested in her ; and as to her personal property, the husband is the owner of it, subject only to certain specially created exceptions : *Watt v. Watt* (u). Except by special contract, she has no testamentary capacity. And these incidents of marriage exist whether she lives with her husband or not. The opinion quoted from *Phillimore* is directly contradicted by *Pothier* (x), who expressly says, that from the instant of the marriage the domicile of the husband becomes that of the wife ; *Merlin* (y) says the same thing : Article 108 of the Civil Code is referred to as decisive on the question even after judicial separation. The sentence of *séparation d'habitation* only affects the pro-

(u) 3 Ves. 244.

(x) Pothier, Introd. Contr. de Mar. No. 522.

(y) Merlin Rep. ; *voce* Domicil, s. V. Ferrière, Dict. : Séparation de Corps et d'Habitation—

but not the character of the parties. In the English separation *à mensâ et thoro* affects only the right to al cohabitation.

principle of the English law is the complete union of the wife with the husband: *Fortescue* (z), *Littleton* (a), and *b*). The poor-law cases have illustrated this principle: *Berkhampstead v. St. Mary's* (c), *St. Giles, Reading v. St. Giles* (d); and *Lean v. Schutz* (e), *Marshall v. Rutton* (f), *St. John v. St. John* (g), *St. John v. St. John* (h), proceeded on this principle. The cases are summed up in *Roper on Husband and Wife* (i). *Tovey v. Lindsay* (k) does not afford argument in favour of the Appellant on the point now under discussion; it only shows that residence and domicile may not be the same for the purposes of citation, whereas with reference to that matter alone that the observations referred to on the other side were uttered. On the other hand, *Warrender v. Warrender* (l) is conclusive of the wife's right to have a domicile other than that of her husband; *Daly's* settlement (m) is to the same effect; and *Williams v. Dormer* (n), and *Geils v. Geils* (o), show that a divorce *à mensâ et thoro* does not affect the wife's domicile. The cases of *Hunt v. De Blaquiére* (p), *Carr v. Stabrooke* (q), *Sidney v. Sidney* (r), *Blount v. Blount* (s), *Greed v. Lavender* (t), *Watts v. Shrimp* (u), all show that the *jus mariti* is not affected by

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| h. 42. | (l) 2 Clark & Fin. 488. 524. |
| i. 291. | (m) 25 Beav. 456. |
| o. Litt. 187 a. | (n) 2 Robertson, Ecc. Rep. |
| Bott. 33. | 505. |
| Sur. Set. Cas. 371. | (o) 1 Macq. 255, 259. |
| Sir W. Bl. 1195. | (p) 5 Bing. 550. |
| 8 T. R. 545. | (q) 4 Ves. 146. |
| 1 Ves. 352. | (r) 3 P. Wms. 269. |
| 11 Ves. 525. | (s) Id. 277 n. |
| Vol. 2, p. 270 n. | (t) 13 Beav. 62. |
| 1 Dow. 117. | (u) 21 Id. 97. |

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adultery ; and in *Chamberlaine v. Hewson* (*w*), where a husband having committed adultery, the wife sued the woman with whom he had committed it, and he executed a release to that woman for the costs, it was held that adultery without sentence did not emancipate the wife from the legal control of the husband. It would be most disastrous if it was otherwise, and this is the more necessary, since reconciliation, without more, puts an end to separation, and all its legal effects.

Here, too, the will of 1856, if admitted, will affect *English* property, and the power itself required the will or deed to be executed with forms which are certainly *English*. If the power is not so executed, the will or deed must be void. Where parties have by contract thus referred themselves to a particular law, a change of domicile cannot operate a change in the contract. Thus in *Foubert v. Turst* (*x*) a contract made in *France* on the marriage of *French* people who afterwards came to live in *England*, was ordered to be specifically executed here, although the terms of it referred to the customs of *Paris*. *Duncan v. Cannan* (*y*), which affirmed a previous judgment at the Rolls (*z*), and *Este v. Smyth* (*a*) proceeded on the same principle.

The allegation here is not sufficient to show the acquirement of a new domicile upon an intention to abandon an old one.

Sir *H. Cairns*, in reply :

The power to make the will is completely independent of the words descriptive of forms, which are, no doubt, entirely *English*. If the power was executed in this country,

(*w*) 5 Mod. 69.

(*z*) 18 Beav. 128.

(*x*) 1 Bro. P. C. 129.

(*a*) Id. 112.

(*y*) 7 De G. Macn. & Gord. 78.

those forms must be observed, otherwise not. The cases cited on the other side only establish, that after separation the domicile of the wife continues that of the husband merely for particular purposes, such as citation. In *Wilson v. Wilson* (b) this House declared that it would enforce, for certain purposes, such as those relating to property, an agreement between husband and wife to live separate from each other, which shows that the law recognises a separation, as conferring inconsistent and even opposing rights on the two parties. Here the case is still stronger, for it is admitted that on these facts neither of the two parties could have sued for a restitution of conjugal rights. In *Daly's* settlement (c) there was neither intention nor power to acquire a new domicile; but *Williams v. Dormer* (d) is in point, and distinctly establishes, that after a sentence of divorce the ordinary presumption that the domicile of the husband is that of the wife entirely fails. Here there was such a sentence; it was acted on by both parties, and these are, therefore, circumstances sufficient to show that the wife was at liberty to acquire, and did in fact acquire, a domicile of her own. If so, then the will of *June* 1856 is valid, and the decree of the Court below must be reversed.

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Lord Cranworth :

This appeal from the Court of Probate was heard at your Lordships' bar early in the present year. Its object was to reverse a decree of Sir *Cresswell Cresswell*, dated the 5th of *March* 1858, whereby he rejected an allegation brought in by the Appellant.

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The facts of the case are shortly as follows. [His Lordship stated them.]

(b) 5 H. L. Cas. 40.

(d) 2 Robertson's Ecc. Rep.

(c) 25 Beav. 456.

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The very learned Judge of the Court of Probate rejected this allegation of the Appellant, on the ground that it stated no case impeaching the validity of the will and codicil propounded by the Respondents, and the Appellant now complains of that rejection. The grounds on which the Appellant relied were, that by the proceedings in *Scotland*, the marriage with the Appellant was dissolved, so as to enable the deceased to contract a new marriage; that she did in fact contract a new marriage in 1854 with General *Des Pontès*, a domiciled *Frenchman* and became herself domiciled in *France*, and so continued from the time of her marriage till her death; and that while so domiciled, she made the will of 23d *June* 1856, in the mode required by the laws of the country of her domicile, which, therefore, was a valid revocation of the will and codicil of *April* 1854. The Appellant farther contended, that even if the divorce was not valid, so as to enable the deceased to contract a second marriage, still it operated as a divorce *à mensâ et thoro*, and enabled her to select a domicile of her own, and that in fact she did select *France* as her domicile, where she lived and died.

The learned Judge of the Court below was of opinion that the *English* marriage was not dissolved by the *Scotch* divorce, and that so the deceased remained up to the time of her death the wife of the Appellant, whose domicile was and had always been in *England*; that his domicile was her domicile, and that the will, or alleged will, of *June* 1856, not having been executed in the mode required by our laws, had no effect on the will and codicil of 1854. He farther held, that the *Scotch* decree did not operate as a divorce *à mensâ et thoro*, and so made a decree rejecting the allegation.

The same points which had been pressed in the Court below were repeated here, and arguments were urged with

great ability at your Lordships' bar in their support. But they have failed to convince me, or, as I believe, any of your Lordships who heard the case. On the first question, that of the validity of the *Scotch* decree of divorce to dissolve the *English* marriage, the decision in *Lolley's* case (e) is conclusive. It was indeed contended in the argument here, that *Lolley's* case did not necessarily govern that now under consideration, for since that decision the principles applicable to this question have been materially changed by the statute 9 *Geo.* 4, c. 31. But this seems to me altogether a mistake. In *Lolley's* case it appears that he having been married in *England*, afterwards went to *Scotland*, and while he was there, not having become a domiciled *Scotchman* (for that must be assumed to have been the state of the facts), his wife obtained a *Scotch* decree for a divorce, on the ground of adultery committed by him in *Scotland*. After the decree was pronounced, he returned to *England*, and married a second wife at *Liverpool*. This was held by the unanimous opinion of the Judges to be bigamy, on the ground "that no sentence or act of any foreign country or state could dissolve an *English* marriage *à vinculo matrimonii*; that no divorce of an Ecclesiastical Court was within the exception in 1 *James* 1, cap. 11, s. 3, unless it was the divorce of a Court within the limits to which the 1st *James* 1 extends." The exception in the statute 1 *James* 1 was of "any person divorced by sentence in the Ecclesiastical Court." It was contended at the bar that the decision might have been different if the case had arisen since the 9th *Geo.* 4, c. 31, which repeals the statute 1 *James* 1, cap. 11, and by s. 22 again makes bigamy a felony, but with a proviso that the enactment shall not extend to any person who

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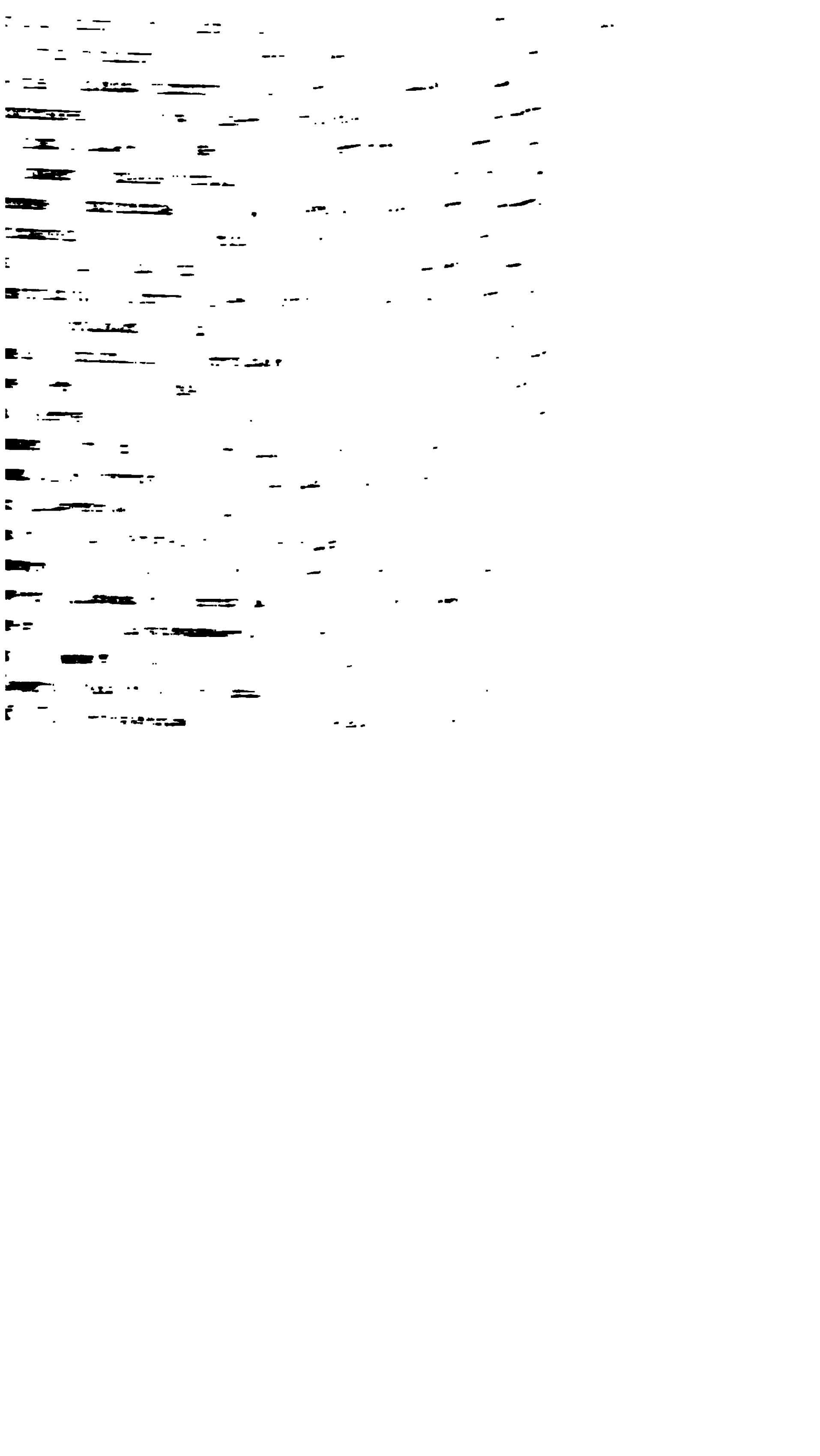
(e) *Russ. & Ry.* 237.

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The very learned Judge of the Court of Probate re-
jected this allegation of the Appellant, on the ground that
it stated no case impeaching the validity of the will and
codicil propounded by the Respondents, and the Appellant
now complains of that rejection. The grounds on which
the Appellant relied were, that by the proceedings in
Scotland, the marriage with the Appellant was dissolved
so as to enable the deceased to contract a new marriage
that she did in fact contract a new marriage in 1854 with
General *Des Pontès*, a domiciled *Frenchman* and became
herself domiciled in *France*, and so continued from the
time of her marriage till her death; and that while
domiciled, she made the will of 23d *June* 1856, in the
mode required by the laws of the country of her domicile,
which, therefore, was a valid revocation of the will and
codicil of *April* 1854. The Appellant farther contended
that even if the divorce was not valid, so as to enable the
deceased to contract a second marriage, still it operated
as a divorce *à mensâ et thoro*, and enabled her to select her
domicile of her own, and that in fact she did select *France*
as her domicile, where she lived and died.

The learned Judge of the Court below was of opinion
that the *English* marriage was not dissolved by the Scotch
divorce, and that so the deceased remained up to the time
of her death the wife of the Appellant, whose domicile
was and had always been in *England*; that his domicile
was her domicile, and that the will, or alleged will, of
1856, not having been executed in the mode required by
our laws, had no effect on the will and codicil of 1854.
He farther held, that the *Scotch* decree did not operate as
a divorce *à mensâ et thoro*, and so made a decree against
the allegation.

The same points which had been pressed in the Court
below were repeated here, and arguments were urged



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at the time of the second marriage shall have been divorced from the bond of the first marriage. It was said that though the *Scotch* Court was not the Ecclesiastical Court contemplated by the statute 1 *James* 1, and that so *Lolley* was not within the exception contained in that statute, yet that as he had been in fact divorced, he would not have been within the proviso of the statute 9 *Geo.* 4, cap. 31. This, however, is evidently a mistake. He was not, and could not be divorced: for, according to the express opinion of the Judges, no foreign Court can dissolve the bonds of an *English* marriage.

Lolley's case has been frequently acted on. In the case of *Conway v. Beazley* (*f*), Dr. *Lushington*, after much consideration, acted on it, treating it as settled law where there is no "*bonâ fide* domicile," a real domicile, and not a domicile assumed merely for the purpose of giving jurisdiction. And I believe your Lordships are all of opinion that it must be taken now as clearly established, that the *Scotch* Court has no power to dissolve an *English* marriage, where, as in this case, the parties are not really domiciled in *Scotland*, but have only gone there for such a time as, according to the doctrine of the *Scotch* Courts, gives them jurisdiction in the matter. Whether they can dissolve the marriage, if there be a *bonâ fide* domicile, is a matter upon which I think your Lordships will not be inclined now to pronounce a decided opinion.

On the other point, decided in the Court below, I think there can be no doubt. If the *Scotch* divorce did not operate as a dissolution of the marriage, it clearly did not operate as a divorce *à mensâ et thoro*. It was not intended so to operate, and it is by no means certain that the deceased would have desired to obtain such a decree. It

(*f*) 3 Hag. Ecc. Rep. 639.

appears, therefore, to me that on both the points raised in argument before him, the learned Judge below was clearly right.

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But on the argument here a new point was started. It was contended that, without any dissolution of the marriage, or any divorce *à mensâ et thoro*, the deceased was, by the acts of the husband appearing on the allegation, placed in a situation enabling her to choose a domicile for herself separate from that of her husband; and that, in fact, she did choose *France* as her domicile, and there lived and died; that when so domiciled, she made the will of the 23d *June* 1856, valid according to the laws of the place of her domicile, which therefore ought to have been admitted to proof, or, at all events, that, as her domicile was at her death *French*, the *English* will and codicil ceased to be operative.

This point was urged with considerable ability and force; and as it was one which had not been put forward below, and therefore had not been considered by Sir *Cresswell Cresswell*, your Lordships desired to have a second argument at the bar confined to this single point. Accordingly your Lordships, a few days since, heard Sir *Hugh Cairns* for the Appellant, and Mr. *Roundell Palmer* for the Respondents, both of whom did full justice to the question argued. I have given my best consideration to the able arguments then addressed to us, and have come to the conclusion that there is nothing in this new view of the case which ought to induce your Lordships to disturb the decision of the Court below.

On the part of the Respondents, it was argued that, even if there had been a divorce *à mensâ et thoro*, the wife could not have acquired a domicile of her own; and, in support of that argument, reliance was placed on the clear and undoubted doctrine of our law, that husband and wife

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are to be treated as one person, that their union, whatever decree may have been made by the Ecclesiastical Court, is by the common law absolutely indissoluble; that the wife can neither sue nor be sued without her husband; that the husband is bound to maintain her, and to afford her a home; that, with reference to the poor laws, her settlement is her husband's settlement; and, generally, that in the eye of the law they are so completely identified, that the notion of her acquiring a separate home could not for a moment be admitted.

I desire not to be taken to adopt this argument at once to the full extent to which it was pushed. If in this case the deceased had obtained, in *England*, a divorce *à mensâ et thoro*, and had then gone to *France*, and there established herself in a permanent home, living there till her death as the wife of General *Des Pontès*, I desire not to be understood as giving any opinion on the point, whether in such a case her domicile would or would not have been French. The question where a person is domiciled is a mere question of fact: where has he established his permanent home? In the case of a wife, the policy of the law interferes, and declares that her home is necessarily the home of her husband; at least it is so *primâ facie*. But where, by judicial sentence, the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory. The power to do so interferes with no marital right during the marriage, except that which he has lost by the divorce *à mensâ et thoro*. She must establish a home for herself, in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal

property are different from those prevailing at the home of her husband, which law, in case of her death, is to prevail? Who, when the marriage is dissolved by death, is to succeed to her personal estate; those entitled by the law of the place where, in fact, she was established, or those where her husband was established? On this question it is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce *à mensâ et thoro*, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out, that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion, that, without such a decree, it must be considered that the marital rights remain unimpaired.

It was, indeed, argued strongly, that here the facts show, that the husband never could have compelled his wife to return to him. The allegation of the Appellant, it was contended, contains a distinct averment that the husband had committed adultery; and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be that where there has been a judicial proceeding, enabling the wife to live away from her husband, and she has, accordingly, selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can be open to any one, after the death of the wife, to say,

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not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right, or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions; and, as was forcibly put in argument at the bar, if the principle were once admitted it could not stop at cases of adultery. For, if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious, that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper. The observations of Lord *Eldon* and Lord *Redesdale*, in the case of *Tovey v. Lindsay* (*f*), evidently had reference only to the facts of the case then before the House, where the question was not as to what would be the wife's domicile as regarded succession to her personal estate, but as to the place where she was to be considered as resident for the purpose of being served with process.

I am clearly of opinion that, without going into questions as to whether the facts are or are not duly pleaded, they afford no ground of defence to the claim of the Respondents, and that the Respondents are entitled to insist on the will and codicil of *April 1854* as being the last will and codicil of the deceased.

I have already observed, that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I should add, that there may be exceptional cases to

(*f*) 1 Dow. 138, 139, 140.

which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has injured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be, that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show, that the able argument of Sir *Hugh Cairns* has not been lost sight of. It is sufficient to say, that in the appeal now before the House no such case of exception is to be found.

Mr. *Palmer*, at the close of his argument, observed that, whatever might become of the will and codicil of *April 1854*, the *French* will of the 23d *June*, 1856, could not be admitted to probate for want of due attestation, not having been executed in the manner and with the formalities required by the power. I incline to think he is right in his suggestion. But whether that would be decisive as to the validity of the prior will and codicil, supposing the domicile of the deceased to have been *French*, might turn on nice questions which have not been argued in this case, as to how far the doctrine, that a will of personalty to be valid must be a will valid according to the law of the domicile of the deceased at his death, would apply to the case of a will of a married woman made under a power. Into this question it is unnecessary for us to travel.

I cannot conclude without saying that, although I am sorry for the delay which the second argument has occasioned to the parties, I cannot regret the course your Lordships took in requiring it. The question was one of great importance; and, not having been raised in the Court below, it required a special consideration when brought for the first time under the notice of this House. I must add, that my noble and learned friends, Lord *Brougham*, Lord *Vansleydale*, and Lord *Chelmsford*, before leaving town,

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told me that they entirely concurred in the view of the subject which I have stated. Lord *Brougham* had expressed some little doubt upon the matter ; but he stated, that he did not think it necessary to remain in order to express that doubt, as his single opinion could not affect the decision.

I shall conclude by moving your Lordships to affirm the decree below, and to dismiss the appeal. But as the questions discussed have arisen from the conduct of the wife, no less than of her husband, and as the case was one of some nicety, and the appeal was presented under the express sanction of the learned judge of the Court below, I think it should be dismissed without costs.

Lord *Kingsdown* :

My Lords, my noble and learned friend has done me the favour to communicate to me the opinion which he proposed to express to the House, and I have had an opportunity of communicating with him my views upon it. And as I concur generally in the conclusion at which he has arrived, and for the reasons upon which that conclusion is founded, I think it will be most conducive to the administration of justice in your Lordships' House in a satisfactory manner, to content myself with expressing that assent, instead of repeating the arguments, or going in detail into the facts to which he has already alluded.

One thing only I am anxious to guard against. If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to acquire a foreign domicile after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House.

There is only one other matter which I will take the

liberty of pointing out to your Lordships, which is this. It was not mentioned, I think, in the course of the argument, but it appears to show most distinctly that no question of law really can arise with respect to this divorce, that it was a mere collusion from the beginning to the end between the husband and the wife. My Lords, the will and codicils which are now propounded are of the most remarkable character. The will gives a legacy of 12,000 *l.* to the husband. The codicil, executed on the same day and attested by the same witnesses, one, I think, being the solicitor or law agent of the parties, revokes that legacy. Now at first sight one is very much perplexed to imagine what could be the purpose of that contrivance, a gift by will of 12,000 *l.*, and a revocation of that gift on the very same day on which it is given. But, my Lords, on referring to the instructions for this will, and to the dates as they appear in these proceedings, the whole matter becomes perfectly clear. Mr. *Dolphin* went into *Scotland* in the month of *February* 1854. He returned, as it appears, on the 9th of *April* 1854, and at that time it is manifest there was a negotiation between the husband and wife for the purpose of procuring the *Scotch* divorce. The will is dated two days after this gentleman comes to *England*, and in the memorandum of instructions for that, though it is not very legibly or very intelligibly expressed, we find these words: "The sum of 12,000 *l.* to *Vernon Dolphin*, Esq., left as Mr. *Robins* thinks best" (I believe Mr. *Robins* was the solicitor), "to be forfeited, if by false or insufficient evidence to procure the present divorce in *Scotland* is established." The language is not very clear, but it is quite obvious what was intended. He was to have 12,000 *l.* provided he would establish in *Scotland* such a case as would enable her to obtain a divorce in that country. My Lords, on the 11th of *April* accordingly his document is executed, or rather, I should say, those

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two documents. He goes back afterwards to *Scotland*, at least is there in the month of *June*. On the 17th of *June* a summons for this action of divorce is served upon him for the purpose of being answered. He comes back to *England*, he returns to *Scotland* for a few days in the month of *July*, and on the 20th of *July* the sentence of divorce is pronounced. It is clear, therefore, my Lord, that it was mere mockery and collusion from beginning to end, and so this must be treated as a case in which the wife still remained under the marital control of her husband. And I entirely agree with my noble and learned friend that in the circumstances of this case there cannot be the smallest doubt that she was in no degree emancipated from the marital control, and that she could not acquire that foreign domicile by which alone effect could be given to the paper propounded in this allegation.

If I had regarded this case as capable of being proved at all, I should still have thought that it would have been impossible to prove it under the present allegation. It would have appeared to me that this lady had, by an act of her own volition, by her own spontaneous act, chosen and acquired a foreign domicile, and that that fact was quite inconsistent with the statement in this allegation, that she had acquired that domicile not by her own volition, but, (it might be) in spite of her own volition by becoming the wife of a domiciled *Frenchman*. But my Lords, as the only effect of giving leave to amend would be, that a case would be brought forward which it would be utterly impossible to sustain, I entirely concur in the conclusion which my noble and learned friend has proposed, that this appeal should be dismissed, and as he suggests, without costs.

The *Lord Chancellor* (Lord Campbell) :

My Lords, as I had not the advantage of hearing the whole argument in this case, I refrain from giving an

opinion upon the general merits of it. But I did hear one question argued, which was a separate question; it was very ably argued on both sides; and I think it may be proper that I should say that upon that question I entirely concur in the opinion which has been expressed by my two noble and learned friends. The first marriage in 1822 remained in full force: there was no dissolution of that marriage, nor any judicial *separation de corps*, as the French call it; there was no such separation as would even amount to a divorce *à mensû et thoro*. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicile separate from that of her husband. Upon the other question to which my noble and learned friend has referred, I abstain from giving any opinion. It is quite clear that the mere consent of the husband that she should live elsewhere, would confer no right upon her to acquire a foreign domicile.

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Order or decree appealed from affirmed, and appeal dismissed without costs.

WALTER R. LAMBERT and others - *Appellants*.

ROBERT R. PEYTON and others - *Respondents*.

THE time for appealing to this House against a Decree or Order of the Court of Chancery in Ireland is, still, notwithstanding the 13 & 14 *Vict.*, c. 89, s. 30, to be calculated from the time of the enrolment of that Decree or Order, and not from the day when it was pronounced in Court.

1860.
Feb. 24.
—
Practice.
Enrolment.
Time for
Appeal.

THIS was an appeal against a Decretal Order of the Court of Chancery in *Ireland*, pronounced by Lord Chancellor *Brady*, on the 22d *January* 1856. Another Order

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was made by his Lordship on the 2d *May* 1856, refusing a re-hearing. An application was then made to the Court of Appeal in Chancery to vary the last preceding Order; but this application was, on the 24th *June* 1857, refused by that Court. Two Orders of the *Master of the Rolls*, dated 22d *December* 1857, and 20th *February* 1858, were made, merely carrying into effect the *Lord Chancellor's* Decretal Order of *January* 1856. This Decretal Order was enrolled by the Respondents on the 12th *May* 1857. The other Orders were enrolled by the Appellants on the 27th *March* 1858. The Petition of Appeal was presented to this House on the 27th *March* 1858. On the 13th *May* 1858, the Respondents presented a petition, praying that the Appellants' appeal might be dismissed as incompetent on account of delay, such appeal not having been brought within the time limited by "The Court of Chancery (*Ireland*) Regulation Act, 1850," and "The Chancery Appeal Court (*Ireland*) Act, 1856" (a).

(a) The sections of the statutes referred to were the following:—

The 13 & 14 *Vict.*, c. 89, s. 30, enacts "That an appeal shall lie to the Court upon motion, from or against all orders, directions, and other proceedings of or before the Master, under this Act; and any order to be made by the *Master of the Rolls* under this Act may be reheard on motion before the *Lord Chancellor*; and any order which, according to the practice of the Court, might be reheard upon petition by the Judge who made such order, may be so reheard upon motion; and an Appeal shall also lie to the House of Lords from all orders to be made by the Court under this Act, yet so that no such Appeal shall be brought or rehearing moved, unless with the special leave of the Court (which leave the Court shall only grant upon being satisfied that substantial grounds probably exist for such appeal or rehearing and for the delay in bringing or moving the same) after the expiration of the following periods from the time when the order, direction, or other proceeding complained of was made or took place, or from the service of notice of the same, if the party complaining was not present; that is to say, for an appeal from the orders or directions of the Master or proceedings before him, not being such reports as hereafter provided for, the period of fourteen days, or such farther time as the

The *Attorney-General* (Sir R. Bethell) and Sir H. Cairns, in support of the objection to the competency of the Appeal:

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Under the words of the statute, 13 and 14 *Vict.* c. 89 s. 30, the time of appealing is to be taken from the time of making the Order. The provision that no Order should be enrolled pending the re-hearing was for the purpose of preventing the party who seeks a re-hearing from being deprived of his right to apply for one, and from being put to the expense, perhaps unnecessary, of an appeal; for there can be no re-hearing after the enrolment of the Order. But the Appellants seem to have imagined that while these applications for re-hearing were undecided, there could be no enrolment, and that, consequently, till the refusal, by the Court of Appeal in *June* 1857, to vary the Order which, in *May* of the previous year, had refused a re-hearing, there could be no enrolment, and that the limit of the power to appeal to this House dated from the enrol-

Master shall by order made in the matter allow; for a rehearing before the *Lord Chancellor* or *Master of the Rolls*, the period of one month (both such periods to be exclusive of any vacations of the Court), and for an appeal to the House of Lords the period of one year, but no order shall be enrolled pending the time hereby limited for appealing there from without the special leave of the Court."

19 & 20 *Vict.*, c. 92 (the Act to constitute a Court of Appeal in Chancery in *Ireland*), enacts, s. 11, that, "Appeals and rehearings under this Act to the said Court of Appeal may be brought without leave of the Court at any time within the period of three months from the time when the decision, decree, or order complained of was made, or shall have taken place, anything in section 30 of the Court of Chancery (*Ireland* Regulation Act, 1850, to the contrary notwithstanding, but that after the expiration of the period aforesaid, no such appeal or rehearing shall be brought unless with the special leave of the Court."

S. 14, enacts that, "All decisions, decrees, or orders of the Court of Appeal, whether on appeals in Chancery, or from the said Commissioners, shall be subject to appeal to the House of Lords in the cases and under the conditions in and under which the like decisions, decrees, or orders of the *Chancellor* would have been subject to such appeal, if this Act had not been passed."

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ment, and not from the making of the decree. But it is only during the time limited for applying to re-hear, namely, one month, that the enrolment of the decree is forbidden.

[Lord *Brougham*: The Act is very badly worded. As it stands now, it seems as if there could be no appeal to this House, except by leave of the Court whose decree was to be appealed against.]

To avoid that absurdity, the Respondents are satisfied to contend, that the words relating to the special leave of the Court apply only to the period limited for a re-hearing in the Court below. It was found that one month was too short a time for an application to re-hear, and the 19 & 20 *Vict.* c. 92, s. 11, extended that period to three months, and there again the clause is badly worded; but the appeals spoken of must be taken to apply only to appeals in the Court of Appeal in *Ireland*, as is shown by the 14th section, which does in terms refer to appeals to this House, and leaves them exactly as they were before the statute passed. The practical effect of the two statutes is this: an Order of the *Master of the Rolls*, or the *Lord Chancellor*, is open to be re-heard for three months from the making of the Order; it is liable to appeal for twelve months from that time, which gives nine months to enrol it after the time for applying for re-hearing has run out, so that neither party can prevent the other from appealing for more than three months. But the Appellant has acted as if there could be no enrolment for twelve months after the expiration of the decision as to re-hearing. That is clearly a mistake.

[Lord *Chelmsford*: If the Court refused a re-hearing, then the complaining party might enrol the decree.

Lord *Kingsdown*: There was here a Decretal Order; then there was a claim to re-hear; that was refused; the Order of *June* 1857 was, in substance, an affirmance of the Decretal Order of *March* 1856.]

No, it was only an affirmance of the refusal to re-hear.

[Lord *Kingsdown*: They could not come here before they tried to get the re-hearing, nor before the judgment of the Court of Appeal refusing to re-hear.]

They might have appealed against the Order, refusing the re-hearing; but even then the principal decree which had not been appealed against in time would remain.

[Lord *Brougham*: Suppose the *Lord Chancellor* had re-heard the cause, but, notwithstanding what was then urged, had refused to alter his decree, there might have been an appeal against the Order made on the re-hearing, but the first Order would be standing all the time, and might then be appealed against.]

No; the second Order would be the substantive decision, against which the appeal would be brought.

Mr. *Butt* (of the *Irish* bar) and Mr. *Smethurst*, in support of the competency of the appeal:

In the first instance, the Appeal Court refused to hear the case till an application had been made to the *Lord Chancellor* to re-hear his decree. It was made, and he refused to re-hear it. To be re-heard, or to be heard on appeal, it was necessary, according to the words in the statute, to satisfy the Court, that "substantial grounds probably existed for such appeal." It was necessary, therefore, to go into the merits of the case. The Court of Appeal refused to vary his Lordship's Order. That was, in substance, an affirmance of the Decretal Order of *January 1856*. Till that matter was finally disposed of, there could not be any enrolment of the decree, and, till enrolment of the decree, there could be no appeal to this House: *Brooke v. Champernowne* (b). The Order of a Master can only be said to "take place" within the meaning of the

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(b) 4 Clark & Fin. 247.

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30th section of the statute, when it is registered, and it was so decided by the *Master of the Rolls* in *Brereton v. Kennan* (c). The same principle must be applied to the Orders of the *Master of the Rolls*, and of the *Lord Chancellor*. [Lord *Chelmsford*: The Master signs his Order, and sends it to be registered.] He does so; but the *Lord Chancellor* does not sign his Orders, and they cannot, especially for the purpose of appeal, be said to have been "made or taken place" till they have been enrolled. Till enrolment, the *Lord Chancellor* may treat the minutes as erroneous, and may vary the words of the Order, which is decisive to show, that, till enrolment, it is not a perfect and valid order.

Sir *H. Cairns*, in reply:

From the time that the Master's Order is put on the files of the Court, it is complete. [Lord *Chelmsford*: When is an Order "made"?] When it is passed and entered. [Lord *Chelmsford*: If the party is not present.] Then it is an *ex parte* Order, and he must have notice of it, and the time runs "from the service of the notice." If the right of appeal is only to be dated from the time of enrolment, the enrolment will often not be made till the last moment as a mere means of delay.

The *Lord Chancellor* (Lord *Campbell*):

Upon an examination of the Acts of Parliament, which are certainly very obscurely worded, we think that the intention of the Legislature was, that the time for appealing should continue to run from the enrolment, and that, therefore, the appeal against the Decretal Order is competent.

(c) 5 Ir. Ch. Rep. (N.S.) 345.

HUR JOHN BETHELL THELLUSSON *Appellant.*
 D RENDLESHAM - - - *Respondent.*
 MAS ROBERTS THELLUSSON - *Appellant.*
 RLES SABINE AUGUSTUS THEL-
 ISSION - - - - *Respondent.*
 HON. R. HARE and others - *Appellants.*
 AHAM WILDEY ROBERTS and others *Respondents.*

1858.
 July 1.
 1859.
 Feb. 10, 11,
 14.
 April 16.
 June 9.
 Will.
 Uncertainty.
 "Eldest Male
 Lineal
 Descendant."
 Former
 Decision.
 Property Un-
 disposed of.
 Practice.

or who had three sons, *A.*, *B.*, and *C.*, directed an accumula-
 of his property for a certain period, at the end of which the
 es were to divide it into three lots, one of which was to be
 yed to "the eldest male lineal descendant then living of *A.*"
 the time for making the allotment arrived, there were two
 as who claimed to be entitled to the first lot, a grandson of
 eldest son, and a son of *A.*'s youngest son; the former being
 st" in line, the latter "eldest" in years among the male
 adants of *A.*: HELD, that the will was not void for uncer-
 y: HELD also, that on the true construction of the words
 by the testator, the grandson of *A.*'s eldest son was entitled
 first lot.

I directed the trustees to receive the rents and profits of the
 or's lands, and from time to time to cut timber and sell it,
 o lay out the rents and profits and the price of the timber in
 urchase of other lands, the rents and profits of which, and the
 of the timber cut from which, were to be laid out in the same
 or; but there was no direction as to the manner in which the
 and profits of the last-mentioned lands were to be disposed
 ELDED, that this omission (there being a general direction at
 id of the will to lay out the money of the testator, however
 , in the funds, and to sell and re-purchase as the trustees
 think fit, until a sufficient sum could be accumulated to
 a proper purchase of land, should present itself) did not leave
 rt of the fund undisposed of, so as to establish a title to it in
 xt of kin.]

ord *St. Leonard's diss.*): that the question of uncertainty
 t been disposed of in any previous decision upon this the
 son Will.

of all parties were ordered to come out of the estate.
 se will not reconsider a question which it has once decided.
 l in a cause, being afterwards raised to the Bench, is not
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thereby precluded from taking part in the hearing and discussion of that cause, but he may properly (unless his doing so would entail great inconvenience and expense on the parties, or perhaps from his being, as in Chancery, the sole judge of the court, amount to a denial of justice) decline to take part in such hearing and decision.

A will was impeached as being void for uncertainty, and its construction was likewise contested. The Court below sustained its validity, and put a construction on it. The next of kin appealed on the first point. Two persons claiming to be devisees appealed on the second : all the parties appeared by different counsel. As their interests were the same, only one counsel was heard for each of the appealing devisees, and only one for each of the Respondents : the counsel for the next of kin were then heard, and were answered in like manner by one of the counsel of each respondent. One of the Appellant's counsel had then the general reply.

WHEN these Appeals were called on,

Lord *St. Leonards* took the opportunity of observing that he had been counsel in various branches of this cause on different occasions ; in 1825, on the question of the right of presentation to the advowson, and again in 1831, when he argued a point which was not now in dispute ; he mentioned these facts, but as he did not conceive that they absolved him from doing his duty in giving advice to their Lordships in the Appeal now to be heard, he intended to take part in the hearing.

The *Lord Chancellor* (Lord *Chelmsford*) said, there could be no doubt about the propriety of the course adopted by his noble and learned friend, but he felt himself to be in a different position. While at the bar, he was counsel in the very case, the decision in which was now the subject of Appeal, and he should therefore take no part in the judgment upon it. He should merely sit as Lord Chancellor, but should not deliver any opinion.

Lord *Brougham* trusted that it would not be assumed that the having been counsel in a cause operated as a dis-

qualification to prevent the same person, when raised to the Bench, from taking part in the decision of that cause ; or, if that was the rule, it might, under certain circumstances, produce terrible delay and expense to the suitor, and even an absolute denial of justice, especially if applied to a Judge of the Court of Chancery. It so happened, that shortly after he became Lord Chancellor, the case of *Tatham v. Wright*, in which he had been counsel on the northern circuit, came before him in Chancery, on a matter which involved the exercise of the Judge's discretion, namely, an application for a new trial. He could not have refused to hear it without causing great expense and delay, and almost a denial of justice to the suitor ; he therefore heard it ; and what he did to satisfy his own mind was this, he obtained the assistance of two learned Judges, Lord Chief Justice *Tindal* and Mr. Baron *Alderson*, and having done that, he himself took part in pronouncing the decision.

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The *Lord Chancellor* feared that he had been somewhat mistaken. He did not suggest that he laboured under any disqualification, for that would be putting the matter much too strongly. If he had been the only Judge having the authority to hear the cause, he should have been in the situation in which Lord *Brougham* had been in the case of *Tatham v. Wright*, and should have acted in the same way. Here there were noble and learned Lords who had not been counsel in the case and could hear and decide it, and therefore as a matter of personal feeling he should abstain from taking any part in it.

The argument then proceeded.

Peter Thellusson, who was a merchant of London, possessed of property to a very large amount, by his Will, dated 2d April 1796, after giving several legacies, made

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a general direction for accumulation during the lives of persons who should "be living at the time of my death or born in due time aforesaid." At the end of the period for accumulation, the accumulated property was to be divided into three lots of equal value "and the premises contained in one of such allotments shall be conveyed to the use of *the eldest male lineal descendant then living of my said son Peter Isaac Thellusson* in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited) of my said son *Peter Isaac Thellusson* successively in tail male, with remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of my said son *George Woodford Thellusson* and *Charles Thellusson* in tail male, with cross-remainders between or among such male lineal descendants as aforesaid of my said sons *George Woodford Thellusson* and *Charles Thellusson* in tail male; or in case there shall be but one such male lineal descendant, then to such one in tail male." The other two allotments were disposed of in the same manner as this first; the second was given to *George* and the third to *Charles*, by exactly the same words of gift as this first had been given to *Peter Isaac*, and there were the like cross-remainders created with respect to these two estates as had been created with respect to the first. As *George* died without male issue before the time for allotting the accumulated estate, it came to be divided into two instead of three allotments.

The testator was possessed of an advowson, as to which his will declared, "that my said trustees do and shall, when and as the same shall respectively be, or become void or vacant, present a fit and proper person thereto, who shall for

that purpose be nominated by one of my said sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant, of my said three sons respectively, in the order and rotation aforesaid, if he be capable by law of making such nomination, when the church becomes vacant, or in due time aforesaid, otherwise the eldest male lineal descendant of the next brother is to present to such living. And in case it shall so happen that when such living or livings shall respectively become void, or in due time afterwards, no male lineal descendant of any of my said sons shall be capable of presenting thereto, I direct my said trustees, or the survivor or survivors of them, or such future trustee or trustees for the time being, to present to such living or livings respectively."

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The testator died on the 27th *July* 1797. There were then living his three sons (named in his will) and four grandsons, namely *John*, *George*, and *Henry*, sons of the testator's eldest son *Peter Isaac*, and *Charles*, son of the testator's youngest son *Charles*. The wife of *Peter Isaac* was then pregnant, and in due time after the death of the testator, two other sons, twins, *William* and *Frederick*, were born. These constituted the nine lives during which the accumulation could continue. Of these nine lives, *Charles*, the testator's grandson, was the last survivor; at his death, which took place in 1856, the period for accumulation ceased, and the estates came to be allotted. The testator's eldest son, *Peter Isaac*, was created Baron *Rendlesham* in 1806, and died in 1808; his son, *John*, became the second baron, and died without male issue; *William* was the third baron; and *Frederick* the fourth baron. The last-named peer died in 1852, leaving a son, *Frederick*, born in 1840, who is the fifth and present baron, and was

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the Respondent in the cause of *Arthur John Bethell Thellusson v. Rendlesham*. *Peter Isaac*, the first baron, had also two other sons: *Edmund*, born in 1799, who died a bachelor in 1818; and *Arthur*, born in 1801, who had a son, *Arthur John Bethell Thellusson*, born in 1826, the Appellant in that cause. In like manner the testator's son, *Charles*, had a son, *Charles*, the last survivor of the nine lives, who died in 1856, leaving a son, *Charles Sabine Augustus*, born in 1822, the Respondent in the cause of *T. R. Thellusson v. C. S. A. Thellusson*. *Charles* had likewise two other sons, *Alexander*, born in 1800, who died in 1820 a bachelor, and *Thomas Robarts Thellusson*, born 1801, the Appellant in this second cause. In each case, therefore, the elder line was represented by a nephew, younger in years than his uncle, who represented the younger line but was elder in years.

From 1798 down to the present time the will had been the subject of proceedings in the Court of Chancery. On the 5th *February* 1856, on the death of the testator's grandson, *Charles*, the accumulation ceased, and the two allotments of the accumulated estate came to be divided. The question then raised was, whether under the terms of the will the uncle, who was elder in age, or the nephew, who was elder in blood (being the son of that uncle's eldest brother), was entitled to take the moiety of the accumulated estates as "the eldest male lineal descendant." When the case came before the *Master of the Rolls*, his Honor declared himself(a) bound by the *dicta* of Lord *Eldon* and the Judges, in *Oddie v. Woodford*, and by the opinions expressed in this House in former cases upon this will, and made (without argument) a decree excluding males who

(a) 23 Beav. 321.

claimed through females, and preferring as "eldest male lineal descendant" the nephew, though younger in age, to the uncle.

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These appeals were against that decree (*b*).

The Judges were summoned, and Mr. Justice *Wightman*, Mr. Justice *Williams*, Mr. Baron *Martin*, Mr. Justice *Crompton*, Mr. Justice *Willes*, Mr. Baron *Bramwell*, Mr. Baron *Watson*, and Mr. Justice *Byles* attended.

Sir *R. Bethell* and Mr. *Selwyn* (Mr. *Markham Giffard* and Mr. *Chapman Barber* were with them) for the Appellants, *Arthur John Bethell Thellusson* and *Thomas Robarts Thellusson*:

The question here to be determined is, who is the person that at the cesser of the period of accumulation is to take the estate. The words in the will describing him are, "eldest male lineal descendant." The first proposition of the Appellant is, that these words must receive their plain and ordinary meaning. The House cannot fix on them a technical meaning of a peculiar kind, for that would be contrary to the intention of the testator, and is not required on account of any inconsistency or repugnancy arising therefrom with regard to the rest of the will. On the contrary, the parenthesis which exists in each clause of

(*b*) The interests of the two Appellants being the same, and those of the first two Respondents being identical, it was proposed and arranged that Sir *R. Bethell* and Mr. *Selwyn* should first be heard for] Mr. *Arthur John Bethell Thellusson* and Mr. *Thomas Robarts Thellusson*, to be answered by Mr. *Roundell Palmer* and Mr. *Rolt* for Lord *Rendlesham* and Mr. *Charles Sabine Thellusson*; that the *Solicitor General* (Sir *H. Cairns*) and Mr. *Faber* should then be heard on behalf of those who insisted that the will was void for uncertainty, that Mr. *R. Palmer* or Mr. *Rolt* should answer them, and that Sir *R. Bethell* should have the general reply.

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each devise shows that the testator did not intend to create an ordinary estate tail to vest at once with merely the enjoyment postponed, for the effect of that parenthesis is, that the vesting of the estate is postponed, and that the persons who would otherwise take as heirs to purchasers are themselves made to take as purchasers. In no previous decision on this will has the effect of that parenthesis been properly considered. The Appellant's second proposition is, that this parenthesis, so far from being disregarded, ought to be treated as giving the key to the legitimate construction of the devise; and on that construction he contends, thirdly, that the true meaning of the words is, the eldest person among the male lineal descendants; in other words, that the person to take must take as eldest in seniority of age and priority of birth. The provision as to the advowson clearly shows that to have been the testator's intention. He did not intend so to frame his will that the persons to take the estates might be said to be ascertained at the time of his death. The testator had no personal predilection in favour of one son over another: he put them all on an equality, and he left it entirely doubtful who would come into the possession of the estates; he desired to keep the ownership of the estates uncertain to the last hour of the period of accumulation, and he did so by stamping on the person who was to take the contingency or character of being then the oldest of his male lineal descendants. The persons taking as purchasers, the principle of succession, therefore, is not, but that of description is, to be applied to them. The testator intended that at the end of the trust the persons within the class to take should be arranged as if they were all the sons of one man, and the oldest among them should be selected; he did not class them according to lines, but put them together in a mass, and preferred the eldest of that mass. The word "descendants"

includes all who proceed from the body of the testator, *Crossley v. Clare* (c); and of these the testator intended that the eldest male, proceeding in a male line, should enjoy the estate.

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Decided cases do not illustrate a will of this kind, for the words of description here are not to be construed technically because the will was drawn by a professional man, but are to be treated as words not of technical, but of ordinary meaning. The case is not governed by *Winter v. Perratt* (d), which went on the ground that the word "heir" used in that will involved the principle of primogeniture. *Wilbraham v. Scarisbrick* (e) was nearer the present. There the meaning given to the words "younger son," was the one "younger in order of birth," and not posterior in point of limitation. In *Livesey v. Livesey* (f), again, the ordinary meaning was put on the words which in that case were "eldest son;" and so it was in *Trevor v. Trevor* (g), where even those technical words, "in tail male," were held to be not descriptive of the issue, but of the interest which they were to take. There is no authority which absolutely requires a court of construction to give a technical meaning even to technical words used in a will.

The real difficulty presented to the Appellant arises from the dicta of Lord Eldon in *Oddie v. Woodford* (h), and from an erroneous belief that that case decided the question which is now presented to the House. The first observation to be made on that case is, that the report is not that of the reporters themselves, but was furnished to them some years after the case was decided, and is framed from

(c) Ambler, 397. 3 Swanst.
220a.

(d) 5 Barn. & Cr. 48. 9 Clark
& Fin. 606. Sugd. Law of Pro-
perty, 271.

(e) 4 Yo. & Col. Ex. 78.
1 H. L. Cas. 167.

(f) 2 H.L. Cas. 419.

(g) 1 H. L. Cas. 239.

(h) 3 Myl. & Cr. 584.

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the shorthand writer's notes. The point before Lord *Eldon* arising out of the claim to present to the advowson, was whether the words of the will comprehended males claiming through females; and he held that a male claiming in part through females was not included in the words of the will. But the present point was not in question, nor is there anything, properly to be called judicial decision which there gives authority for the argument now set up by the Respondent. The word *male* was there connected with *lineal*, but *eldest* is not connected with *lineal*, so as to receive the meaning of males claiming through males of the eldest blood. It has not the double meaning of the eldest stock, and the eldest son of that stock, but stands as a description by itself. Eldest is the attribute of the first taker, and the natural meaning of eldest is first in age, and second is in the same way second in age. The judgment in *Oddie v. Woodford* contains, in the course of it, many expressions which are now relied on as adverse to the Appellant. But in truth they do not bear that character, and are mere *obiter dicta*.

[Reference was then made to many passages in the judgment, for the purpose of showing that the real decision was confined, as the marginal note of the report confined it, to the sole point of a right being in a male claiming through males only, the other matters being mentioned by way of illustration only.] In the earlier decisions on this will (i) the only question was, whether the will was not void for remoteness; and those decisions, therefore, have no application to the present appeal.

The advowson clause affords a strong argument in favour of the construction contended for by the Appellant. The testator, it is clear, sought there for the eldest person of

(i) 4 Ves, 227. On Appeal, 11 Ves. 112.

the family, as the person who was to present to the advowson; but as it might happen that even the eldest male lineal descendant might not be of age at the time of a vacancy, and as the testator seems to have believed that an infant could not present, he directed that the trustees should present. There is no pretence for saying that in that matter he confined himself to the line of descent; he wanted the eldest man of the family to present; and so, in like manner, he desired the eldest man of the family to take the estates.

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There is no pretence here for the contention of the next of kin, that this will is void for uncertainty. A Court will never hold a devise uncertain unless no fair construction can be put upon it, *Wright v. Atkyns* (j). The question of uncertainty has already been adjudged; for the original decree was made on a bill filed for the sole purpose of carrying the trusts of the will into effect; and those trusts were then judicially declared valid, and ordered to be executed. The question, and the only question now is, who are the proper persons entitled to the benefit of that decree; and it is submitted that, as to one moiety of the accumulated estate, the Appellant being in fact the "eldest" of the lineal male descendants, is entitled to take.

Mr. Rolt (Mr. Crawford Bromehead was with him) for the Respondent, *Charles Sabine Augustus Thellusson*; and Mr. Roundell Palmer (Mr. Christie and Mr. Renshaw were with him) for Lord Rendlesham:

The construction sought by the other side to be put on this will would defeat the plain intention of the testator. It supposes him to have been guilty of a silly caprice to designate the "eldest" as he might have designated the "tallest"

(j) 17 Ves. 255; 19 Ves. 290.

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among his male lineal descendants as the person to take the estate. There is no ground for imputing to him such a capricious intention. On the contrary, it is clear that he intended to follow the strict lines of male descent, and that the technical words he used were used with their ordinary technical meaning. The other construction might lay the will open to the objection of uncertainty, but uncertainty was just what the testator desired to avoid. His wish was to establish three families of great wealth, and with that view he extended, so far as the law allowed, the time for accumulation, and put off the period of the allotment of the accumulated estates; but he meant that, when allotted, each lot should go to the head of each of the three lines of his family, in conformity with the ordinary rules of the descent of land. It may be that these persons were to take by purchase, but in determining the meaning of words of purchase, the rules of inheritance may be applied to them; and this may be done as well to the word "descendant" as to the word "heir." Here the estate vested; the enjoyment alone was delayed.

The word "eldest" has two meanings, that of seniority in age and of priority in rank or station; which of these two is to be assigned to it in this will must depend on the whole context of the will, *Chapman's Case* (*k*), *Jarman on Wills* (*l*); and that context shows it to have the latter meaning. It has already been decided that the person to take must be a male, claiming through males, *Oddie v. Woodford* (*m*); yet if "eldest" is, as contended on the other side, to be severed from the other words of description, if lineal and male are not inseparably connected with it, but the word may be read as eldest among the de-

(*k*) Dyer, 333 *b*.

(*l*) Vol. ii. p. 27, *et seq.*

(*m*) 3 Myl. & Cr. 584.

endants, the person to take might be a male descendant, aiming through a female, for he might be the eldest of the descendants. The whole question was, in fact, decided in that case, in the course of which Lord *Eldon* again said again speaks of the same person being entitled to take the presentation as would be entitled to take the estate when the period of accumulation ceased.

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There is no such thing as second eldest or third eldest; the words second and third must be taken in their ordinary sense; and the use of the word "successively," shows that they were meant to take one after another, according to the rules of inheritance. Then, again, it is, "successively in tail male," and nothing can be clearer to indicate the order by line, and not by mere seniority of individual age. It is absurd to suppose that the testator intended that if, just before the allotment, a particular person, fully answering the description should die, though he left male issue, his issue should be excluded, and the whole line of takers altered.

On Monday, *July 5*, when the argument was to be continued, the *Lord Chancellor* announced that the Judges could not farther attend at that time, as they were required to go their circuits.

The hearing of this case was resumed before Lord *Brougham*, Lord *Cranworth*, Lord *St. Leonards*, and Lord *Wensleydale*; the Lord Chancellor (Lord *Chelmsford*), presiding. The same Judges as before attended.

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Sir *R. Bethell*, knowing that their Lordships had a full note of his previous argument, would not now again address them.

Argument for the Respondents resumed.

It is true that in some parts of the will there appears a

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desire to put all the sons on an equality; but that is only part of his design, by which the testator intended to found three of the greatest families in England. In other respect there was the ordinary preference shown to the eldest, according to the law of primogeniture. Thus he had the first option as to the purchase of the house, and the first right to present to the living. The word eldest has a double meaning; first, it is that which has endured the greatest length of time, but it is also that which designates superiority of position. Thus Sir *Walter Raleigh* (n), after describing the governments of ancient times, as founded on the habits of families, says, "Hereof it came that the word 'elder' was always used, both for the magistrate and for those of age and gravity, the same bearing one signification in almost all languages;" and he refers to the Bible for some of his illustrations. Thus also the eldest Peer, the eldest Judge, the eldest Admiral would not necessarily mean eldest in point of age, but prior in point of rank; and here it is impossible to sever "eldest" from "male lineal descendant," and to make it stand by itself as a separate word of description; it means the chief or primary lineal male descendant, and refers to the rule of primogeniture, and not to the accident of age.

The rule of primogeniture was applied in *Winter v. Perratt* (o), when Mr. Justice *Taunton* said, "I think the first male line meant first in degree and worthiness of blood." So it was in *Wilbraham v. Scarisbrick* (p).

"Descendant" is an emphatic word of inheritance and descent, *Blackstone* (q); it is in this will to be treated like the word "heir;" and the argument on the other side which supposes the contrary, would get rid of all the case

(n) Works, vol. ii. c. 9, s. 1, p. 339, Oxford edit.
 (o) 9 Clark & F. 606. 613.

(p) 1 H. L. Cas. 167.
 (q) Comm. Bk. II. c. 14.

in which, from the context of a will, the words "family," "stock," and "house" have been construed as words pointing out the heir, *Chapman's Case* (r); *Counden v. Clarke* (s); in the latter of which it is expressly said, "If land be devised to a *stock*, or *family*, or *house*, it shall be understood of the heir principal of the house." Thus a devise to A. and his "family" would be an estate tail to the heir of A. as *persona designata*; *Wright v. Atkyns* (t), before Sir W. Grant, and afterwards before Lord Eldon, where his Lordship expressly adopts the words used in *Counden v. Clarke*.

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The argument on the other side, that the words must have what is called their ordinary meaning, namely, the oldest descendant among the male lines, is defective in itself; but even that construction would leave it open to question what was the meaning of the oldest descendant, for it would not follow that it was the oldest man among the male descendants. It might mean that person who, in right of priority of line, was the principal descendant. But the words actually used do not admit of this hypothetical meaning, and the word "successively" strongly aids in fixing the descent upon a line, and getting rid of the uncertainty of mere personal age, for there could be no order of succession if the takers are to depend on the accident of the age of the individuals.

The parenthesis has no effect on this construction; it was necessary to be introduced, as Lord Eldon explains in *Oddie v. Woodford* (u), "in order that when an estate was limited to A. B., in tail male, the descendant of that A. B., his sons, grandsons, great grandsons, &c., should not have an estate limited to them by way of purchase, but

(r) Dyer, 333 b.

(s) Hob. 29.

(t) 17 Ves. 255; 19 Ves. 299.

(u) 3 Myl. & Cr. 602, 619, 620.

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they were to take by way of descent from him." The parenthesis, therefore, was not overlooked, but was fully considered at that time.

The clause, as to the advowson, does not assist the argument on the other side. Unless the will has made infancy a disqualification, and the only disqualification to present the law does not make it so, *Arthington's case* (v). It is clear that the testator laboured under the notion that an infant could not present, and therefore, in order to avoid this difficulty, and prevent the loss to the family, and for another purpose, he directed that the one who was capable of presenting, should exercise that right; otherwise, he intended each son to present, in rotation; the eldest line, not the eldest person, here, as in other cases, having the preference. But infancy is not a disqualification, and therefore, the whole argument derived by the Appellants from the error of the testator, as to the law relating to advowsons, fails.

Again, in the ultimate gift, the testator says, "on failure of male lineal descendants of my said sons," naming all three of them, showing that he used those words in the same sense as words creating estates, in tail male, are ordinarily used. And it is to be observed, that this peculiar expression is afterwards repeated. Wherever the opportunity occurs the intention to give the estates in conformity with the rule of primogeniture is manifested.

The Solicitor General (Sir *H. Cairns*) and Mr. *Faber* for the next of kin:

The will is void for uncertainty. The next of kin are not barred from raising this question now, for it could not

(v) 2 Eq. Cas. Abr. 518, adopted by Lord *Eldon*, *Oddie v. Woodford*, 3 Myl. & Cr. 607.

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arise till the death of *Charles Thellusson*, the younger, and that did not occur till 1856. This question has not been before decided. The only point decided was, that the trusts for accumulation were not void for remoteness, but the point of uncertainty as to the person to take, when the accumulation was at an end, never was decided. First of all, there is an uncertainty which the will has created, but against which it has not provided. The estate is directed to be divided into three lots. The eldest male lineal descendant (whoever that might be) was directed to take one, the second to take another, and the last to take a third. But by the events which have happened, there is no person to exercise the right of second choice; and therefore it has become uncertain which of the two remaining lots is to be conveyed to the eldest male lineal descendant of *Charles*, and which of the two passed over in the event of there being no male lineal descendant of *George W. Thellusson*. At all events, therefore, there is a partial intestacy as to these lots.

There may be a decree to execute the trusts of a will, but such a decree does not make valid trusts that, on the face of the will, are bad, *Gooch v. Gooch* (w). In many parts of the judgment in *Oddie v. Woodford* (x) did Lord *Eldon* express the great doubt and uncertainty in which the devises in this will were involved, and the very question now raised as to the meaning of the word "eldest" is a proof of the great difficulty of coming to any conclusion whatever as to the real meaning of the will, and establishes in the strongest manner the fact of its uncertainty.

There is, however, a special ground on which the next of kin may rely. There is a direction as to the purchase of lands, the testator having directed his residuary personal

(w) 3 De G. M. & Gord. 366.

(x) 3 Myl. & Cr. 584, 596.

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estate to be laid out for that purpose, and the rents of land so purchased, which, for convenience sake, may be described as the first land, are to be laid out in the purchase of other, call it second, land, and the rents of second land are to be laid out in the purchase of or call it third land; but there is no provision whatever as to what is to be done with the rents of this thirdly purchased land. As to them, therefore, there is a resulting trust in favour of the widow and next of kin of the testator living at the time of his death. A similar resulting trust arises with respect to the rents of lands purchased with timber which is from time to time to be cut down and sold, the produce of the sales to be invested in the purchase of land. There is no provision whatever as to what is to be done with the rents of the land thus purchased from the produce of the timber. The decree has not in any way noticed these matters, nor made any provision for giving the next of kin the benefit of those resulting trusts [Lord *St. Leonards* read the decree and the authorities from the 4 and 11 *Ves.*, to show that these matters had been previously considered and decided.] That had reference only to the question, whether the whole will was not void for uncertainty. The particular point now presented was not then under consideration.

Mr. *G. L. Russell*, on behalf of the trustees in whom the legal estate was vested under the will, appeared to disclaim all interest, and to submit to the order of the House to convey the property, and to support the decree, so far as it gave the trustees their costs out of the trust estate.

Mr. *Rolt* replied, on the question of uncertainty:

As to the supposed uncertainty, relied on by the Solicitor General, the will, in the particular portion referred to

spoke of the specific purchases; but, in the latter portion of the will, there were general directions as to purchases to be made from time to time; and the same answer applied to the money, and the lands to be purchased with that money, arising from the sale of the timber.

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Sir *R. Bethell* replied on the whole case.

The *Lord Chancellor* moved that the following questions should be put to the Judges:

1st. Whether the devise by the testator of his lands, tenements, and hereditaments, after the decease of the several persons during whose lives the rents and profits of the same are directed to be accumulated (if it had been a devise of legal estates), to the eldest male lineal descendant then living of *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, respectively, in tail male, is capable of an intelligible construction, or is void for uncertainty?

2d. If at the time directed by the testator for the division of the estate into three lots, and for conveyances to be made thereof, *Peter Isaac Thellusson* had had three sons, all of whom were dead, and the eldest of the three sons had left a son under age, and the second son had left a son of 21 years of age, and the third son had left a son of 30 years of age, and supposing it had been a devise of legal estates, which of the sons of the three sons would have been entitled to one of the lots?

The Judges requested time to consider.—Ordered.

Mr. Justice *Byles*:

16 April.

My Lords, it would savour of presumption in me to apologise to your Lordships for the brevity of my replies to the questions propounded by your Lordships to the

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Judges ; but lest I should be thought guilty of disrespect, or want of duty to the House, I may perhaps be pardoned for stating, that almost immediately on the conclusion of the arguments, I was compelled to leave town for the Northern Circuit, from which I have but just returned, and only received your Lordships' summons at a late hour yesterday afternoon.

In answer to the first question, and for the reasons given in answer to the second, I am of opinion that the devise is capable of an intelligible construction, and is not void for uncertainty.

In answer to the second question, I am of opinion that the words "eldest male lineal descendant then living" indicate the person who, at the period of distribution, should answer the description of heir male of the body.

The learned counsel for the Appellants contend, that they indicate the one of all the descendants in the male line who should be the most advanced in years. Call, they say, all the male lineal descendants into a room, and choose the eldest person there. He is the eldest male lineal descendant in the popular and obvious sense of those words. A plain unlettered man, they add, would think this the natural and obvious construction of the words; and the question is, not what construction a lawyer would give to the words, but what a plain man, such as the testator, would understand by them.

But here seems to me to lurk the capital fallacy in the Appellants' argument. In what language is this will written? Is it written in popular and colloquial English, or is it written in the technical, I had almost said the scientific, language of the law? It is not necessary to look beyond the four corners of the instrument to see that it is conceived in language strictly and eminently technical,

that it is penned by a lawyer, that it is addressed to lawyers, and intended to be understood by lawyers in a legal and technical sense.

It may be, and no doubt was the fact, that the testator was not a lawyer; but, if so, he must have retained a lawyer, and in that case the true question is not so much, what did the testator mean? as, what did the penman whom he retained to express his intentions, mean? A testator who retains a conveyancing counsel to draw his will, disposing of large property, with various and complicated provisions, has a very obscure, cloudy, and imperfect conception of the details of the instrument; but his counsel has a very clear and perfect one; and the testator is bound by the intention of his counsel, to be collected from the will. His counsel is, as it were, his translator, and the formal existing translation of the testator's instructions into technical language is the only will. It is the language of a lawyer addressed to lawyers. Its technical sense is its strict primary acceptation.

It seems to me, therefore, that the question is, not what an unlettered layman meant, or what an unlettered layman would understand by this devise, but what a lawyer meant and what a lawyer would understand.

Now, could any lawyer, looking at the will, deem it probable that the testator, or his counsel, in founding a family, meant (without any clear indication of such an intention) to disregard the ordinary course of limitation when indicating the first taker, though he religiously adhered to that course in the subsequent limitations; and not only so, but that, instead of the ordinary and usual course, he should substitute a novel, gratuitous, capricious, and unreasonable one, that he meant that the estate should go, first, perhaps, to a very distant descendant, then to a very near one, and then, perhaps, to an intermediate one?

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No doubt, if the language of the devise clearly indicates an intention so capricious and unreasonable, that intention must prevail. But surely, when one considers that this is a will framed by a lawyer, and addressed to lawyers, the intention must appear very plainly. Now, does the language indicate such an intention?

What is the meaning of the word "eldest" in the phrase "eldest male lineal descendant"? The word eldest may have different meanings, but its meaning here is most satisfactorily ascertained, if it can be collected from the will itself; and it seems to me, not only that it can be collected, but that it is clearly shown by the will itself. The word "eldest" is correlative to the words, "second, third, and fourth," and the words, "second, third, and fourth," are the correlatives of the word "eldest." If so, then the word "eldest" means first, and the phrase "eldest male lineal descendant" means "first male lineal descendant." Now, if the words had been "first male lineal descendant," at least the Appellant's interpretation regarding the personal age of the individual could have found no place.

But, besides this, in the strict propriety of the English language, the word "eldest" (though its etymology be the same), is not synonymous with the word "oldest;" for the word "eldest" does not necessarily or even primarily import eldest in personal age. According to Dr. Johnson, its primary meaning is, "oldest, that has the right of primogeniture," and its secondary meaning is, "the person that has lived most years;" and surely this primary sense of the word is as agreeable to the context as any other. Therefore it should seem that the word "eldest," here taken in its strict and primary acceptation, means "eldest" in the order of primogeniture, not eldest in personal age.

But even supposing the word "eldest" to be synonymous with oldest, it is by no means clear that it is to be

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taken out of its place, and read with the word "descendant," as if it immediately preceded that substantive, and qualified it, and it only. On the contrary, it may well and more naturally be considered as part of a compound adjective, composed of the three words *eldest*, *male*, and *lineal*. So read, it qualifies the word *lineal*, as well as the word descendant, denoting no less the oldest line than the oldest descendant in that line.

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It has been objected, that if the penman of the will had meant heir male of the body he would have said so. But the formulæ using this term which have been presented to your Lordships are far more circumlocutory and less compendious than the testator's expression, and perhaps at the time the will was drawn the use of the word *heir* was not deemed preferable for safety and perspicuity, it being the testator's intention to create estates by purchase.

The parenthesis, which excludes from the right to a conveyance the heirs in tail male of the donees in tail male is a precaution quite consistent with this construction, for without that precaution the trustees might have been called on to execute conveyances granting estates by purchase in remainder to a multitude of persons, who, looking to the possible future cases of forfeiture by the ancestor, or debts of the ancestor, and fines levied, might deem it advantageous to have an estate tail in remainder by purchase as well as an estate tail by inheritance.

The clause relating to the right of presentation seems to me to fortify this construction. Lord *Eldon* seems to have thought that it contemplated a supposed disability from infancy. If so, then the testator seems to speak of an infant as eldest male lineal descendant, though in the next line there be a male lineal descendant of full age.

For these and other reasons of minor importance it seems to me, even if the case were not affected by any

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authority, that the construction for which the Respondents contend is obviously and clearly the true construction.

But the authorities to which your Lordships' attention has already been directed seem to me to lead to the same conclusion.

Mr. Baron *Watson* :

Mr. Baron
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My Lords, in answer to the first question submitted to the Judges, I am of opinion that the devise is not void for uncertainty, but capable of an intelligible construction. The construction of wills and of all written documents is by law vested in the Judges, who are bound to put construction and interpret the true meaning of all words in the *English* language used in any written document. Much doubt and difficulty often occur in ascertaining the proper meaning of words : but whatever doubt or difficulty occurs, the Court or Judge is to ascertain and determine the sense in which particular words or phrases are used. It is not because there is much obscurity or difference of opinion in the construction of a will that therefore it is void. In this particular case, I think that the devise in question is perfectly intelligible. Indeed, I consider that the objection on the ground of uncertainty is determined by the case of *Thellusson v. Woodford* (y).

In answer to the second question submitted to the Judges, I am of opinion that the son of the eldest of the three sons, as mentioned in the question, would be entitled to one of the lots. The scheme and object of the will are unusual. They are to create an accumulation of a large property, and then to divide the fund into three shares, to be distributed equally between the three sons of

the testator at the termination of the accumulation upon the death of the last life. The plan was eccentric; but the will, framed for the purpose of effectuating it, does not betray any eccentricity, but elaborately works out that object. The clause on which this question turns abounds with legal phraseology, and contains all the legal terms used for the limitation of estates. The conveyance is to be made of one allotment "to the eldest male lineal descendant then living" of *Peter Thellusson*. Looking at these words, it is difficult to think that the testator meant the eldest in point of age. The words "eldest descendant," or "eldest male descendant," might, if the rest of the will supported it, bear such a construction. But effect must be given to the word "lineal;" and, taking the words "eldest male lineal descendant," I think it means the descendant who takes in the ordinary line of descent. It is worthy to be observed, that in no part of the will are the words "male descendant" or "eldest male descendant" used without the word "lineal."

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The remainder to the second, third, fourth, "and all and every other male lineal descendant or descendants then living, successively in tail male," is most important, in this view. Hence it would appear that the testator used the word "eldest" as synonymous with the word "first," and it would then be read "first male lineal descendant," and would render the sense intelligible.

It has been urged that these words might be read, the second in point of age, and the third in point of age. But there is nothing in this or in any other part of the will to show that the words of number were used in any other than in their ordinary sense, and as they are commonly used in limitations in deeds and wills. It is to be observed, that the testator limited estates in tail male in his lineal descendants, and in the devise over he designates

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the extinction of such estates as “failure of male lineal descendants.” In fact, the testator’s object was, that there should be, as near as could be, estates tail male in each lot in his three sons.

My Lords, I do not think the advowson clause throws any light on the case. Although the precise point has never been directly decided, although in *Thellusson v. Woodford* (z) and *Oddie v. Woodford* (a),[†] it was not necessary to decide this, the main question on the will, yet we have the opinions of Mr. Justice *Buller* and Lord *Eldon* on the points now in question, and which are entitled to the greatest possible consideration.

For these reasons, and for the reasons and opinions expressed by those great lawyers, I have come to the conclusion that the son of the eldest son mentioned in the second question would be entitled to this lot.

Mr. Baron *Bramwell*:

Mr. Baron
BRAMWELL.

My Lords, in this case, as in others of a similar description, the question is, what intention has the testator expressed by the words he has used; in effect, what is the meaning of those words, that is, the natural and primary meaning?

Now, I do not agree with Sir *Richard Bethell*, that this will is to be construed without reference to legal learning, for the will was drawn by one who undoubtedly had a knowledge of the craft. But I agree that the case ought to be considered without any prepossession, professional or otherwise, arising out of the ordinary practice of preferring the person who would be heir male to all others. Indeed, the scheme of the will makes any other disposition quite as probable. I take that to have been, to found

(z) 4 Ves. 227.

(a) 3 Myl. & Cr. 584.

three families, owners of large property; and for that purpose to postpone the period of enjoyment as far as possible, the testator having no care or concern for any individual in particular, so that the more uncertain he made the person who was to take the more likely he made it that its enjoyment would not be anticipated, and so the larger would be the property to descend. But I think this argument in itself of the smallest value, and worthless, when it is borne in mind that the uncertainty would have been still greater had he named the *youngest* male lineal descendant as taker. And a consideration of at least equal force points the other way, viz., one or more of his descendants might acquire (as is the case) a title. If the testator thought of this, he probably would have wished the fortune to go with it. But perhaps this did not occur to him; perhaps he did not wish the two to go together. This is mere speculation.

The words themselves then must be construed. They are, "eldest male lineal descendant." The person or thing named is a descendant. The other words are used to indicate a quality or qualities which he must possess. Now "male lineal" has been construed to mean as though it were one word, signifying "male in a line of males." With this construction I entirely agree; and I agree that it may be read as though it were a compound word "male line." It remains to construe the word "eldest." It may seem a very simple mode, but I cannot help considering the case thus:—"eldest" is an adjective; it describes a quality; it must belong to some substantive. What substantive is there in this sentence? One only, "descendant;" with that then it ought to agree. It is true, that if "male lineal" is read "male line," another substantive is introduced; but it is used adjectively to describe a quality, and surely it is not a reasonable construction,

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when there is a substantive in a phrase ready for an adjective to agree with, to hold that the adjective, instead of agreeing with it, agrees with a substantive, produced out of another adjective, and itself used adjectively. The phrase seems to me like this, “a strong iron bridge;” that means a strong bridge made of iron, not a bridge made of strong iron and the meaning would be the same if the phrase were a “strong iron made bridge,” the words “iron made” being connected like “male line,” and containing in like way a substantive. I have been asked, suppose a man said he went over a “*Scotch* iron bridge,” what would he mean? I answer that must depend on circumstances. If, speaking in *India*, he said he had done it on that day, he must mean a bridge of *Scotch* iron; but if the conversation had been about the iron bridges of different countries, and he said that he had done it a year ago, I should understand that he meant a bridge in *Scotland*. It seems to me, therefore, that the natural construction of the phrase is to couple “eldest” with “descendant,” and read it as though it were “eldest and male lineal descendant.”

Then the primary meaning of “eldest” is oldest; most old, most aged; nor do I think any of the instances given, show that the word is used in any other sense; eldest man or descendant is the one who has existed for the greatest number of years. Eldest male line is that male line which has existed the greatest number of years. Eldest parent may mean eldest in age, or eldest *quâ* parent. But though, therefore, “eldest” in the phrase “eldest male line,” if coupled with line, may well be said to be used in its primary sense, so also “eldest” must be so construed when coupled with “descendant.” This, therefore, would go to show that the phrase meant “that descendant in the male line who is oldest in age or years.”

I understand Lord *Eldon* thought this to be the natural

meaning of the phrase, standing by itself. Is there then anything in the context inconsistent with this? It is said that the subsequent mention of two, three, four, and other male lineal descendants shows that "eldest" is used synonymously with "first," and that first means worthiest, that is, the heir. To this I do not agree. The first word used is "eldest." I take the next word "second" to mean second eldest, and so on. It is said, "second eldest" is not grammar; there can only be one "eldest." I do not agree in that. I suppose it would be good grammar to say, "*A, B, and C* are the three oldest men in the parish." If not, is it right to say "the eldest three?" No; for that supposes some division into threes. Must we then have a long periphrasis to describe the idea. Would it be wrong to say, "that *Wellington* and *Napoleon* were the greatest generals of this century"? But the objection, if well founded, vanishes by reading "second" as meaning "second in age." It is said that this is to interpolate a word there, viz., "eldest" or "age." Even if so, that is as legitimate as to turn "eldest" into "first;" but the objection is altogether unfounded. In the first place, the word is not interpolated by this construction; that is to say, it is not said the *word* ought to be there; it is only said that "second" is *equivalent* to "second eldest." But farther, the Respondent's construction does *interpolate* a word; he reads the phrase "eldest male lineal descendant" as though it were "eldest male line eldest descendant," or rather, "first male line eldest descendant." It is in vain to say that the law would add that second "eldest" for him. Perhaps so; and had the testator said he meant his "descendant in the eldest male line," probably the law would have intended that to mean "the eldest descendant;" but such an expression is not a natural one. The natural expression, if the testator had meant what the

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Appellant says he did, supposing he had used something like the phrase in question, would have been, “eldest male lineal eldest descendant.” I find nothing, therefore, inconsistent with what seems to me the obvious and natural construction. So I should have thought some of the phrases suggested by the Appellants’ counsel more natural than the one in question to express the intention that the Respondents contend for. But, on the other hand, I cannot see why, if the testator meant what the Appellants say he did, he should not have said “eldest male descendant in a male line.”

Is there, then, anything else in the will to explain this phrase? I think the parenthesis affords a clue. No doubt it may have been put in *ex majori cautelâ*, but it is to be taken to be operative, and consequently to except what otherwise would have been included. Then, but for the parenthesis, “eldest male lineal descendant,” “second and third” might have included grandfather, father, son; while an uncle would have been fourth and his son fifth. Now, it is not conceivable that the testator considered the son of an eldest son to be “second” in preference to his uncle, older than himself. How could such a son make a male line second to his father’s? The Respondents read the will thus:—“The first male line descendant is to take; that is, the eldest descendant of the first male line, then the second male line, that is, the eldest descendant of that line; but for my parenthesis I should mean by this the heir male of my eldest son as the first taker, and his eldest son as the second, because that is the natural meaning of second male line.” But it is not the natural meaning. The testator, therefore, must have made the parenthetical exception because he had some other meaning, and not that which the Respondents contend for.

Again, if eldest male lineal descendant is to be read first

male lineal first descendant, the word "first" doing double duty, so second should be read "second male lineal *second* descendant." which cannot be.

Again the advowson clause affords a clue to the meaning of these words. The testator, after providing for the eldest male lineal descendant in each son having successively the right of nomination, says, the trustees are to present, if "no male *lineal* descendant" of any of the sons shall be capable, not saying, no "*eldest male* lineal descendant." It would seem, therefore, that he thought that if no eldest male was capable, then no male would be. Now, the only reason, right or wrong, which could have suggested this to him, was that an infant could not present, and that if the eldest male lineal descendants were infants, all the rest must be, which could only be on the supposition that eldest meant eldest in point of age.

But I do not much rely on this. I take the phrase itself, and endeavour to find out its natural meaning, without any prepossession, professional or otherwise. I take that to be the right course. I know no better rule to be acted upon in these cases than that stated by Lord *Cranworth* in *Grey v. Pearson*, (b), nor a stronger illustration of its application than *Trevor v. Trevor* (c) where words used by a testator had their natural meaning given to them, though that meaning led to unusual results, one which *à priori*, would not be expected. It seems to me that the natural and ordinary sense of the words here used, is that which I attribute to them, and that the Respondents' construction is unnatural and forced, and without any sufficient reason for its being preferred. I cannot do better on this point than refer your Lordships to Lord *Eldon's* argument,

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(b) 6 H. L. Cas. 78.

(c) 1 H. L. Cas. 239.

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the very elaboration and ingenuity of which to my mind make it suspicious.

I have not referred to authorities. No question of law is involved, and the rule of construction to be applied is not doubtful.

I answer, then, your Lordships' second question first; viz., I think the son of the third son would have been entitled. Of course I answer the second, that I think the devise is capable of an intelligible construction, and not void for uncertainty. Nor can I say, contingently, that if my answer to the second question is not adopted, it would be so void, as I should say it must then mean what the respondents say it does. I should only think it void, if I had determined that it had one of these meanings (as I feel sure it has), but had no reasonable certainty which meaning it had.

My Lords, this is the opinion I have formed. I offer it with no confidence in its correctness. Indeed, I think the nature of the case precludes a positive opinion. No legal principle is in issue, and the question cannot be decided by authority. The matter to be determined is, which of two interpretations is to be given to words that may have, though they are not the fittest to express, either meaning.

Mr. Justice *Willes*:

Mr. Justice,
WILLES.

My Lords, upon the first question put to the Judges, I am of opinion that the devise is capable of an intelligible construction, and is not void for uncertainty. What that construction is will appear by my answer to the second question.

Upon the second question, I am of opinion that the son of the eldest son would be entitled.

appears to me that the expression, "the eldest male descendant then living," is not a mere description of individual as descendant oldest in point of age and of male sex. Such a construction would exclude altogether from consideration the word "lineal," or would treat it as superfluous. It is therefore a construction to be rejected, if the language used be capable of being otherwise construed, so as to give effect to the word "lineal:" and if the language is capable of being so construed by reading it as a description, or rather definition, of the individual is to take, by reference, not merely to his personal qualities, but also to those of a line which he is to represent, viz., as "eldest-male descendant of the eldest-male

So to interpret the phrase does no violence to the words used, and it is necessary so to interpret it, in order that one of those words, "lineal," should work somewhat, and be not idle and frivolous, contrary to the maxim, *ba aliquid operari debent; verba cum effectu sunt accipienda.*"

It can hardly be a matter of serious doubt that the words do, to some extent, contain a definition of the line which the individual is to represent. He is to be male of one of males. The word "male" applies to the individual and also to the line. This is an effect of the use of the word "lineal," expanding the operation of the word "male," and causing it to apply to the line which the individual is to represent as well as to the individual himself, so as to restrict the class in which the individual is to be sought to males deriving through males.

Thus, then, the word "lineal" has the operation above ascribed to upon the preceding word "male" so as to make the word describe the line as well as the individual, it must equally have that operation upon the word "eldest" which precedes "male," and so make "eldest-male" de-

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scribe the line as well as the individual. "Male" may be applied to an individual or to a line; so equally may "eldest." No peculiar elective affinity exists between the words "male" and "lineal," or the ideas which they express, to make the latter, as it were, select, and seize upon the former, and detach it from the other portion of the compound adjective "eldest-male-lineal," and so convert it alone into a description of the line in which the individual is to be sought, as well as of the individual himself, leaving the other descriptive word, "eldest," to designate only a personal quality of the individual, apart from and independent of such line. Why, then, should this limited effect be arbitrarily imposed upon the word "lineal" by an artificial construction, when the result would be to reject that which ought rather to be sought after, viz., a definition, open to no doubt, of the very individual who is to take, by reference to a known and usual mode of selection, and unnecessarily to adopt a strange mode of selection by accident, open to doubt and litigation, from amongst a crowd. I say accident, and accident, moreover, not tending to effect any intention of the testator, because there is no limit of age mentioned, and the accumulation during a minority might even advance the object apparently in view.

The only consistent mode of construction, therefore, is to give the word "lineal" equal effect upon each part of the description, "eldest male," and to hold that the conjoint effect of the words, "eldest-male-lineal descendant," is to express and designate the "eldest male descendant of the eldest male line."

This is an intelligible construction. It avoids the absurdity and the uncertainty of the other constructions which may be suggested; and it is sanctioned by the great authority of Lord *Eldon*, who, considering the case from a different point of view, gave his opinion at large upon the

onstruction of this will, in a judgment which is, I venture
think, as conclusive, and, allowing for inaccuracies of
addition, as clearly expressed a document as I have ever
had the advantage of reading ; *Oddie v. Woodford* (d).

I therefore conclude in favour of the son of the eldest
son.

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Mr. Justice *Crompton* :

My Lords, I think that the devise in question is capable
of an intelligible construction, and is not void for uncer-
tainty, and that in the event suggested in the second ques-
tion the son of the eldest son, though younger in years,
would take in preference to the sons of the younger
brothers.

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If the phrase “eldest male lineal descendant” stood
alone, I should be very much inclined to think that it
meant the first in male lineal descent, as I think the word
“*eldest*” in such a disposition, and with reference to such
a subject matter, and used in such a phrase, points to the
eldest in descent, and not to the “oldest” in years ; but
when considered as a part of one entire set of limitations
to the eldest male lineal descendant, with remainder to the
second, third, &c. male lineal descendant *successively* in tail
male, it seems to me clear that the word “eldest” is used
in the sense of “*first*,” and as correlative to the words
“second,” “third,” &c.

Suppose that the limitations now in question had begun
with a devise to the *second* male lineal descendant, with re-
mainder to the *third, fourth, &c.* successively, there could,
I think, have been no doubt that the order of succession
was meant by the numerical words “second,” “third,” &c.
And it seems to me that the words “second,” “third,”

(d) 3 Myl. and Cr. 584.

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&c. clearly show that the word "eldest" is used in a sense which it may well bear, as the first in succession, according to the authorities referred to at your Lordship's bar. Either it must be so construed, or else the word "eldest" must be inserted after every numeral, and it must be read second eldest, third eldest, &c.; and this appears to me to be straining the words much more than would be done by construing the word eldest in a sense in which it is often used in such matters, as meaning first in the order of succession. The word "eldest" being correlative to the word "second" must either be construed to be "first," so as to have the same numerical meaning as the words "second," "third," &c., or else the word "eldest" must be inserted after every numeral. And I cannot help thinking that if the testator had in his contemplation the relative age of the descendants, *inter se*, the words "second oldest," &c. would have been used.

The construction I adopt seems to me much more consistent with the rest of the will and with common sense than the other construction, and also more consistent with the previous determination of your Lordships' House; and it is supported by the very strong authority of most eminent Judges, who have considered this will judicially, and whose opinions in matters of this kind are entitled to the greatest weight.

The will, however justly to be disapproved of, is not an inconsistent will, or a will without certain defined objects; which are, to make the property as large as possible, by continuing the accumulation as long as the rules of law would permit, and afterwards to constitute three large family estates in the lines of the testator's three sons. And every provision in the will is consistent with the intention of the estate going in the lines of the three sons in the usual course of succession to landed estates.

The testator's object seems to me clearly to have been, to give an estate tail to the person who would have taken it if he could have limited the estates so as to go in the usual course of strict settlement, but as this would have prevented the provision for accumulation, he postponed the vesting of the estate tail as long as he could ; I see, however, no reason to suppose that he had any intention that the estates should not go in the regular line of family descent. The necessity for the postponement to effect the purpose of accumulation seems to me sufficiently to explain the object of the testator in this respect ; and, judging from the general object of the will, I should say that the construction that eldest means first is a much more probable one than that by which the line of succession is altogether disregarded, and the very fantastical notion introduced of the oldest in point of years among all the descendants of each son taking in succession according to the number of their years.

It seems to me that, both in common sense and according to your Lordships' former decision, and especially when reference is had to the succeeding limitations to the sons in numerical succession, the phrase is not to be construed by searching for the descendant who is oldest, who is a male, and who is lineal ; that is, the person who answers the description pointed out by each of these epithets, or else the party claiming through a female must have been entitled. He was oldest, he was a male, he was lineal, and he was a descendant. This House, however, most properly looked at the meaning of the phrase taken together as applicable to the subject matter, and held that the expression meant in the male line of descent.

In such a phrase "eldest" seems to me clearly to mean the eldest descendant in the eldest branch or line, and the phrase does not seem to me by any means an inapt one

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to express that the testator meant the eldest in that sense. And I do not think the phrase can fairly be applied to a person who is not eldest in lineal course of descent. If it were not for the doubts that have been expressed on this occasion, I should have thought it superfluous care to express by the repetition of the word "eldest" that he was to be eldest in the eldest line.

It was said, indeed, that the devise might have been to the party who should be heir male at the period of distribution. But there seems to have been quite sufficient cause for avoiding that mode of limitation, by reason of the doubts that had existed with reference to that expression. And the other modes which have been suggested at the bar as more proper conveyancing modes of effecting the purpose, as far as I could follow him, certainly appeared to me very much involved in words, and of great complexity, and by no means so simple or natural a way of expressing what seems to be the intention as the one actually used.

When your Lordships' House has decided that the phrase in question relates to the course and line of descent so as to exclude males claiming through females, though male, though lineal, and though descendants, and when, on the first occasion when this will received a judicial consideration, the two learned Judges and the *Lord Chancellor* evidently construed the phrase as I am now doing; and when that most eminent person in matters of this kind, Lord *Eldon*, in coming to a decision, adopted the same construction, and acted upon it as the main *ratio decidendi* of the very question before him, and that decision was confirmed by this House, I own that I think the weight of authority very great in this case.

Lord *Eldon* appears to have taken great pains in considering the question; and I do not think his judgment en-

titled to the less weight from the expressions which he uses as to the case being one of difficulty. There is, moreover, great weight, I think, in the observation made by Mr. *Rolt*, that Lord *Eldon*'s difficulty arose from the period of distribution being delayed until the death of certain female issue, and that he solves the doubt he had by the conclusion he arrived at with reference to the construction of the phrase now under your Lordships' consideration, and as to which he appears to me to express a clear and decided opinion on the very point now before this House.

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The counsel for the Appellants relied greatly upon the parenthesis in the clause in question. This appears to me in no respect to support their argument, but, if anything, to be in favour of the other view. It says, in effect, the conveyance shall be made in tail male to the eldest lineal descendant, and then there shall be remainders to the second, third, &c.; but mind, when I say remainder to the second, I do not mean you to limit the estate in remainder *exempli gratiâ* to the son of the party who takes the first estate, as he would take as heir in tail under the estate tail which I wish to constitute.

The parenthesis was, perhaps, in strictness of words necessary, supposing the construction to have no reference to the relative ages, for the son might be the second male lineal descendant after his father, the first; and, therefore, the testator says, the remainders are not to be made to such descendants as would take the estate tail by descent as heirs in tail; and this proviso seems to me rather to favour the case of the Respondents, as if, according to their argument, the meaning is, the first, second, &c., without relation to age, it was very probable that the first and other takers might have sons, probably younger than many of their uncles, or members of the collateral branches,

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who would, though younger, have been the next in the line of male lineal succession.

I cannot see that the advowson clause, so much relied on by the Appellants, throws any clear light on the question before your Lordships. In that clause provision is made for the nomination to the advowsons before the time of the divisions of the estates; and as it could not be ascertained to which of the three families the advowson would belong, and which would have the right to the particular presentation, and as the value of such right of presentation would not properly be the subject of accumulation, the testator gives it in rotation amongst his sons, and after his sons' death to the parties who should be his male lineal descendants, one representing each line, although the period for the accumulation ceasing had not arrived. It is to go in rotation amongst the three sons whom the testator may be supposed to have known to be capable of nominating; but if they are dead, then it is to go in rotation amongst the three persons who then fill the character and relation of eldest male lineal descendant; and if one of these three is incapable, he loses his turn, and it goes, not to the next in order in that line, but to the representative of the second or next line. If the want of capacity is to be understood as referring to infancy only, it would seem to be rather in favour of the Respondents' construction, as it would seem to suppose that the person being male lineal descendant was likely to be an infant.

But, my Lords, I confess that the construction attempted to be put upon this will appears to me to make its provisions so fantastical and absurd that your Lordships ought not to adopt it, unless forced by a most clear manifestation of the testator's intention expressed on the face of the will. The construction, as illustrated at the Bar, by supposing that all the descendants are to be put

to a large room, and that the oldest in years is to be
 cked out, and the second oldest, and so on, seems to me
 warrant the remark of Lord *Eldon*, that it went far to
 ke him hold up his hands, and say, "Could it be
 ssible he meant this?" What kind of a settlement
 to be made? You are to take the oldest, say an uncle
 the direct male lineal descendant, being the tenth bro-
 er of the father of the real lineal descendant, and then
 u may jump back to a cousin or son of the fifth brother
 his father; go again to an uncle, the second brother of
 e father; and then jump again to a remote aged cousin.
 ell might Lord *Eldon* remark on the strangeness to
 nveyancers of such a settlement.

We are told, indeed, that our minds are not to be in
 e conveyancing groove, and it is thrown out that the
 s we attend to the opinions of persons who have been
 the habit of construing wills and marriage settlements
 e more likely we are to be right, and we are warned parti-
 larly against paying any respect to the extraordinary legal
 ainments of minds like Lord *Eldon*'s. But, my Lords,
 utterly protest against the doctrine that, in construing a
 ill of this or any other description, we are to divest our
 inds of all conveyancing knowledge, and more especially
 f the knowledge which every tolerably informed person
 as of the mode in which property descends in this country.
 lot that I think that any peculiar legal knowledge is
 equired for the construction of the clause in question, for
 believe that ordinary persons reading, either in a will or
 eed, or a novel, that an estate was to go to a man's
 ldest male lineal descendant, and so on in succession to
 he second, third, and fourth, &c., would understand that
 it was to go according to the lineal course of succession,
 and would never fancy the meaning to be that it should
 go to the oldest man among the descendants. And this

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would, I think, be the ordinary primary common sense meaning which a person of ordinary understanding and information would put upon the phrase.

My Lords, we have heard a great deal about taking words in their plain ordinary sense, and I quite agree to that rule, when properly understood and rightly applied: but that rule means that words are to be taken in their plain ordinary sense with reference to the subject matter in the instrument to be construed. Taking hold of a particular word, and giving it the meaning which it most often bears, will lead into great mistakes, if we do not remember that the rule must refer to the meaning it bears with reference to the subject matter. Construing “eldest” in a disposition like the present, in the sense of oldest in years *inter se*, appears to me to resemble the observation of the clown in the old play, who, in answer to the inquiry, “Which is the Queen’s high constable”? replies, “Why, the *tallest* man, to be sure;” and numerous illustrations might be given of the use of epithets generally bearing a particular meaning, which in reference to another subject, have always what may be called in one sense a secondary or derivative meaning, but which, when applied to a particular subject matter, can only be understood in such secondary or derivative sense.

I think then that, with reference to such a disposition as the present, the words “eldest male lineal descendant” would be understood either in a popular or legal sense, as clearly pointing out the eldest or first in the line of male descent; and that if there could be any doubt, the way in which the remainders are limited to the second, third, fourth, &c. in succession, in numerical order, clearly shows that numerical succession is intended, and demonstrates that, by the “eldest,” is meant the first, as used in relation to the second, third, fourth, &c. immediately following;

and I think that the argument in favour of this construction is not weakened, but, if at all affected, is strengthened by the parenthesis, and that the clause as to advowsons does not weaken the argument in favour of the Respondents' construction. I think also that, looking to the whole will, the construction by which the estate goes, as it would have done if the estate tail had commenced earlier in the course of succession, is the one in accordance with the general scope of the will. And I think that the construction, according to which all the parties are to be collected, and the remainders limited, according to the relative age of the descendants, and the estate is to jump about from one of the branches to another in the way proposed, is so fantastical, unheard of, and inconsistent with the clear intention of the testator to make three family estates to descend in tail male to the descendants of each of his three sons, as not to be fit to be adopted by your Lordships without the clearest possible words, incapable of any other rational construction.

For these reasons I answer your Lordships' questions by saying, that I think the devise in question capable of an intelligible construction, and not void for uncertainty; and, secondly, that, in the event supposed in the second question, the son under age of the eldest of the sons of *Peter Isaac Thellusson* would have been entitled to one of the lots.

Mr. Baron *Martin*:

Assuming the devise upon which the questions proposed by your Lordships arise, not to be void for uncertainty, the point is, whether the words eldest male lineal descendant, living at the death of certain persons described in the will, designate the male lineal descendant then eldest in blood, inheritable by descent, or the male lineal descendant then

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eldest in age. It was contended on behalf of the Respondents, that the point has been concluded by the judgment of this House in *Oddie v. Woodford*. It seems to me quite clear that it was not. The litigation in *Oddie v. Woodford* was upon what has been called the advowson clause. One claimant was *Henry Hoyle Oddie*, the grandson and only male descendant of *George*, the testator's second son, through a daughter, who therefore combined in himself eldership, both in blood and in age. The other claimant was *Charles*, the eldest son of the testator's third son, *Charles*, who also combined in himself eldership in blood and in age. It is therefore impossible that it could then have been judicially decided, and the opinion of Lord Eldon was, of necessity, extra-judicial.

The rule of law as to the construction of wills was agreed on at your Lordships' bar. The cases of *Wilbraham v. Scarisbrick* (e), *Livesey v. Livesey* (f), *Towns v. Wentworth* (g), and *Grey v. Pearson* (h), were referred to. The rule approved of and adopted in all these cases is, in truth, the second proposition laid down by Sir *James Wigram* in his Treatise; viz., "That when there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other sense than their strict and primary sense, and when the words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words in the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation." No direct authority has been found, nor was one likely to be. Lord *Eldon*, in speaking of this will,

(e) 1 H. L. Cas. 167.
 (f) 2 H. L. Cas. 419.

(g) 11 Moo. P. C. Cas. 526.
 (h) 6 H. L. Cas. 61.

“Mr. *Thellusson* took into his head what never entered into the head of any one before.”

regards the will itself, it seems to me to have been read with great care by a person well acquainted with the subject, and, therefore, of the character to apply the above rule of construction ought to be strictly followed.

The expression, “eldest male lineal descendant,” has been found in any will which had been the subject of judicial construction before the date of Mr. *Thellusson*’s will and appears to have been deliberately adopted. The rules upon which the construction is to be given are repeated three times, and the expression, “eldest male lineal descendant,” is used in every place where it is at all applicable.

Where it first occurs, the words are words of purchase. They are a “*descriptio personæ* ;” the description of an individual who is to take, as purchaser, an estate in tail at a future period of time. The first question is, as to their strict and primary sense and meaning. The description is composed of a substantive and three adjectives. The meaning of the substantive, “descendant,” is clear. As regards the first of the two parts into which the property is now to be divided (and the question is the same as to both), all who proceed from the body of *Peter* the eldest son, and includes both the claimants. If it were required for this, it will be found in *Cross v. Clare* (i). The three adjectives, “eldest male lineal” have been dealt with in the argument in two ways: separately; and, secondly, conjointly. The words “lineal” have already received a judicial construction in this House, viz., that they describe a male through

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(i) Ambler, 397 ; 3 Swanst. 320 n.

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a line of males ; thus far, therefore the point is concluded. But this description also includes both claimants. They are both males through lines of males. The question now under consideration therefore depends upon the meaning of the word “eldest.” It seems clear that its primary meaning is oldest in age ; the dictionaries are generally to this effect, and the legal authorities are the same. Lord Eldon says, in *Oddie v. Woodford*, *primâ facie* it denotes age ; so also the *Termes de la ley*. In Lord Coke’s commentary upon the 245th section of *Littleton*, he states that the “*enitia pars*,” or part of the elder in coparceny, belongs to the eldest in age at the death of the ancestor ; and if the eldest daughter dies in the lifetime of the parent, leaving a child, the eldest daughter living at the time of the death shall have the choice, and not the child of the eldest daughter. So also in the case of *Tanistry (j)*, where the question was, as to a custom that land should descend “to the eldest” and “most worthy man of the blood and name of him who died seised” ; it is said that eldest means priority in point of time.

It therefore seems that the words “eldest male lineal descendant,” in their strict and primary sense, taken *simpliciter*, and as of themselves, mean the male descendant in a line of males who was eldest in age at the appointed period of time. But it was argued that the three adjectives together meant as a “*descriptio personæ*” the individual who was then heir of the body of *Peter Isaac* in tail male. None of the words, however, is a technical word. The word “lineal” has no peculiar meaning in the law. A meaning and construction has been already given to it by a judgment of this House. No case was cited where any such construction was ever given ; and,

(j) Sir John Davys’s Rep. 35.

In my opinion, taken in their strict and primary sense, the above is their meaning; and it will be seen hereafter that Lord *Eldon* more than once states that this is their primary meaning.

It was argued, that if an estate was devised to *A.* and his eldest male lineal descendant it would give *A.* an estate in tail male. Assuming this to be the legal construction of such a devise, the words would be words of limitation, not words of purchase; and the distinction between words more strongly pointing to eldership in blood than "eldest male lineal descendant," where used as words of purchase or as words of limitation, is pointed out in Lord *Coke's* "Commentary upon the Second Section of *Littleton*" (*k*). He says, if there were two brothers, *A.* and *B.*, and *B.* had two sons, *C.* and *D.*, and died, and *C.* died, leaving issue, and "an estate for life were made to *A.*, remainder to his next of blood in fee, *D.* would take the remainder, because he was next of blood, and capable by purchase, though he be not legally heir by descent."

The next question which arises upon the application of the above rule or canon of construction is, whether it appears from the context that the testator used the words in other than their strict and primary sense. The clause of the will consists in a direction "that the property shall be conveyed to the use of the eldest male lineal descendant then living" (that is to say, living at the termination of the accumulation), "of my son *Peter Isaac* in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate was thereby directed to be limited) of my said son *Peter*

(*k*) 10 *b*.

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Isaac successively in tail male.” Certain of these words, upon which much argument and reasoning were urged, are printed in a parenthesis. Whether they were so written in the will is not stated. The present question is, whether the context affords aid to either of the constructions contended for, or is equally consistent with both?

The Respondents contend that the words and context together express the intention that at the appointed time an estate in tail male, by purchase, should be given to the male descendant of *Peter Isaac*, eldest in blood inheritable by descent, which limitation was to include all the descendants of this individual, born or unborn; that the second estate tail should be given to his second brother, if he had one, and so on to his other brothers, and his uncles and male cousins, descendants of *Peter Isaac* by seniority in blood, inheritable descent being always observed; and that it was immaterial whether the first taker was an infant, and the next a man of full age; and the alleged natural favour towards the elder in blood was urged in support of this view.

On the other hand, it was contended that the context showed that the intention was, that at the appointed time all the male descendants of *Peter Isaac* should be marshalled; that the eldest in age should be ascertained, and an estate in tail male conveyed to him, which was to include all his descendants, born and unborn; that the second estate in tail male should be limited to the next eldest descendant, excluding the issue of the first taker, and so on; and it was urged that this was probably the intention of the testator, he being a foreign merchant engaged in trade, and not likely to have, and, indeed, showing by his will, that he had not, any prejudice or feeling in favour of eldership in blood.

Some argument was adduced upon the word “successively;” but, according to either construction, the taking would be in succession, or one after the other. The word “successively” has no technical meaning; it generally means a numerical succession. Every succession may be described as numerical.

It was assumed, in the argument, that the words in the parenthesis are parenthetical, and it may be so; but, whether they are or not, and, notwithstanding all the reasoning which has been addressed to them, it seems to me that their meaning is clear, and equally consistent with one construction or the other. In my judgment they mean, that no descendant of a purchaser shall take by purchase, and they were introduced possibly for two reasons; one, that it would be absurd to give an estate to A. and the heirs male of his body, and then an estate to his eldest son B. and the heirs male of his body; the other, that if the words second and third, &c., could be held to include the unborn child of an unborn child, it might possibly be construed to create a perpetuity, and so defeat the intention of the testator.

The remainder of the context is, second, third, fourth, and every other male lineal descendant or descendants living. The adjectives “second,” “third,” “fourth,” &c., are descriptive of persons. They are descriptive of persons in the same way as eldest is descriptive of a person. The limitation or succession does not start from the person designated the “second,” but from the person designated the “eldest.” The next person to take after him is the second. The present question is, Second in what? The answer surely is, Second in that in which the eldest, or eldest, is first; and if that be in age, the second is second in age. If it be eldest in blood inheritable by descent, second is second in blood inheritable by descent.

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This is the natural and usual mode and form of expression; and to have repeated the word eldest after second and third, and so on, would not have been in accordance with the ordinary way in which men express themselves, either in writing or in speaking.

I, therefore, think the context affords no real aid. If the words "eldest male lineal descendant then living" means eldest in blood, "second" means second eldest in blood; if they mean eldest in age, "second" means "second eldest in age;" and in my judgment, therefore, the whole question depends upon and is concluded by the meaning of the first words; but the opinion of Lord *Eldon* was to the contrary, and it is entitled to the greatest weight, and it would be unbecoming in any one to differ from it, except for what to his own mind are most satisfactory reasons.

I have read the judgment several times, and the leading vice (if I may be permitted to use the expression) of his opinion upon the present question is, that throughout he seems to consider it impossible that the testator could have had the intention imputed to him by the Appellants. In page 622 of the judgment, after stating what he deemed to be the *highest improbability possible*, he put the intention which the Appellants contend the words of the will express, and states it to be an improbability still higher.

He says, indeed, that it was a state of limitation which Mr. *Thellusson* might by possibility contemplate, but that if he did, he was the first man in the world who ever did. He never seems to me to have fairly taken into his consideration the two constructions, and applied his mind to the consideration of the true question, viz., whether the words of the will expressed the one or the other. It is sufficient to suggest this as a general observation.

I do not mean to comment at length upon the Judgment,

but to confine myself to the statement of Lord *Eldon's* opinion upon the present question, and his reasons for it. He says, in page 615, that he had not been able to satisfy himself that the word "second" means the second eldest male in the ordinary sense of the word eldest male; but so far as I can collect, he gives no reason why what he himself calls the ordinary sense is to be departed from. He then says, the question will be, whether, to give consistency to the whole of the description, that is, not merely to look at the general description of the first person who is to take, but at all the descriptions of all the persons who are to take, the word eldest is not to be taken as synonymous with the word "first." Now, here his Lordship plainly states, that the general description of the first person who was to take, viz., "eldest male lineal descendant then living," means eldest in age. He then proceeds to state his opinion, that "eldest" should be taken as synonymous with "first." Now, in this I submit his Lordship departs from the true rule of construction, and from the rule as laid down by himself in this very Judgment. If the word eldest means *primâ facie* eldest in age, the synonyme for it is not "first," but "first in age;" and he substitutes as a synonyme what is not a synonyme. He then comments upon the word "successively," upon which I have already remarked. He then says, "that brings it back again to the question, What is meant by the words 'eldest' or 'FIRST' male lineal descendant?" Now it seems to me to be contrary to principle and to legitimate construction to introduce the word "first" in this way, and if a synonyme is to be introduced at all it ought to be the true one, viz., *first in age*. He then proceeds to state, that substituting first for eldest, first male lineal descendant means first in blood. For the reasons given, I cannot agree with him,

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and, I think, there is nothing in the context to aid in the disputed construction.

There also seems to me to be nothing in the general scope and object of the will to aid it; but I certainly think the testator did not contemplate, as was suggested by the learned counsel for the Respondents, that any of the intermediate descendants should be promoted to the peerage. His expressed wish is, that his sons should continue to carry on business; and there are several other expressions in the will which clearly show that he had no desire that they should be promoted to a rank in life above that of his own.

There was much discussion at your Lordships' bar as to what form of words or expression would probably have been used by a conveyancer to express and carry out the two different intentions imputed to the testator. I think this is a matter entitled to some weight. Suppose the testator to have given instructions to the conveyancer that he desired that there should be conveyed to the individual who was heir in tail male of the body of *Peter Isaac* at the end of the accumulation, an estate to him and the heirs male of the body of *Peter Isaac* (which is the intention and object for which the Respondents contend), *Mandeville's* case (*l*), would at once have suggested to any lawyer the mode of effecting and carrying it out. Mr. *Fearne's* book was then, as now, in the highest estimation, and in general use. At page 80 (*m*), he discusses and explains this case, and the limitation in it, and points out how it did effect this very supposed object and intention. It is also difficult to conceive why, if this was his intention, any remainder should have been directed at all. An estate to the heir male of the body of *Peter Isaac*, habendum to him

(*l*) Coke Litt. 26 *b*.(*m*) Ninth edit.

and the heirs male of the body of *Peter Isaac*, would create an estate which would go in precisely the same course of succession, be barrable by the same means, go to the same individuals, and have the same extent and duration of continuance as all the estates, including the remainders comprised in the direction in the will. The answer made to this at the bar was, that it was then doubtful whether the person to take by purchase as heir male of the body of *Peter Isaac* must not also be heir general; and Mr. *Hargreave's* note to Coke Litt. (n) was cited. This difficulty would have been obviated by a very few words, viz., that by heir male was meant the individual who would then take an inheritance by descent.

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But, on the other hand, suppose the testator to have instructed his conveyancer that what he desired was, that his property should accumulate for the longest possible period; that he meant to ignore, as it were, all his intermediate descendants; that the individuals who were to enjoy the property would be unknown to him; that he was indifferent who should enjoy it, provided they were descendants in the male line; that he disregarded their relationship to each other, and desired to act as father to all the then living male descendants of his three sons respectively, and do, as people generally do, give the first estate to the eldest; and therefore he desired that at the end of the accumulation an estate in tail male should be conveyed to the then eldest living male descendant of *Peter Isaac*, and the same as to his two other sons, with remainder to the next eldest, and so on; I would ask what general words, using them in their primary, natural, and ordinary sense, could more appropriately express this intention? And this may possibly explain the parenthesis, if any ex-

(n) 24 b.

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planation of it be sought for. According to the argument on behalf of the Respondents, the parenthesis is idle and unnecessary, and merely expresses what was expressed before ; but in the latter supposition the conveyancer might well have said to Mr. *Thellusson*, “ Do you mean that after having limited an estate to the eldest male descendant in tail male, if his son should be older than the next collateral, that an estate in tail male is to be limited to him ? ” Mr. *Thellusson* would have naturally said, “ No ; that it would be absurd to do so,” and then the parenthesis would be essential to express his intention.

There is a passage in the Judgment of Mr. Justice *Buller* (o), worthy of attention upon this point. His Lordship says, “ the person who settled this will did not know how to limit to an heir male by way of purchase.” It never seems to have occurred to his Lordship that the testator might have directed, and the conveyancer intended, that the estate should not be so limited. In truth his Lordship begs the whole question. He conceives in his own mind what the testator meant, and then complains that the conveyancer has not expressed it. I apprehend the true legal mode of construing a will, or any other written document, is to ascertain from its words what it means, and give effect to the language used, unless to do so be contrary to law.

An argument was also urged upon the advowson clause. The testator directed that the trustees, upon a vacancy in a living, should present a person who should be nominated to them by one of his sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant of his three sons respectively, in the order and rotation aforesaid, if

(o) 4 Ves. 326.

he be capable by law of making such nomination, when the church became vacant, or in due time afterwards; otherwise the eldest male lineal descendant of the next brother was to present; and if it should happen that when such living became void, or in due time after, no male lineal descendant of any of the sons should be capable of presenting, then he directed that his trustees should present.

This argument is founded upon the presumption that the incapacity contemplated by the testator was one supposed to arise from infancy. Lord *Eldon* thought it pretty clear that the testator had the notion that infancy incapacitated (*p*); and observing that the incapacity is confined to the descendants, excluding the sons, it seems to me that there is little doubt but that Lord *Eldon*'s view is correct. The expression "eldest male lineal descendant" is here made use of to describe an individual (other than his three sons) living during the period of the accumulation, and the provision is made in the contemplation of that individual being an infant; now, if the testator meant by the expression "eldest male lineal descendant" what the Respondents impute to him, he would naturally, in the event of the individual so designated being an infant, have directed the presentation to go to the next eldest in blood of the same stock, and not to the descendant of the next brother. But if the testator meant by that expression what the Appellants impute to him, if the eldest individual of one stock was an infant, all the other descendants of the same stock would necessarily be infants also, and then the eldest male lineal descendant of the next brother would be the proper and natural person to have the presentation. But it seems to me that the latter part of the clause puts

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(*p*) 3 Myl. & Cr. 606.

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this point in a stronger light. The trustees are to present, if there be no male lineal descendant of any of the sons capable of presenting. This includes all the male descendants of all the sons, and contemplates them all being incapacitated by infancy, and seems very strongly to prove that by the expression eldest "male lineal descendants" the testator meant to designate the eldest in age.

The result is, that in my opinion the question depends upon the meaning of the word "eldest". I think there is nothing in the context which aids the disputed construction. The context is equally sensible and consistent with either. If "eldest" means eldest in age, "second" means second eldest in age; if "eldest" means eldest inheritable by descent, "second" means second inheritable by descent. The word "descendant" is plain; "lineal descendant" equally plain. It is an expression in common use. *A. B.* is "a lineal descendant," or "the lineal descendant" of some eminent man. It is an emphatic expression, denoting direct descent. The strict sense and the popular sense concur. The remaining word is "eldest." The Appellants satisfy it in its strict and primary sense, and such meaning is sensible with reference to extrinsic circumstances. The word may be capable of a popular or secondary interpretation; but I can find nothing in the will to justify a departure from the strict and primary one, and it is for the Respondents to establish it. According to Lord Coke, there are two kinds of eldership in blood, viz., next of blood inheritable by descent, and next of blood capable by purchase. The Appellants are the next in blood in the latter sense, and I think the Respondents fail to establish that the testator expressed in the words used by him his intention that the first purchaser should be the male lineal descendant of *Peter Isaac* living at the end of the

period of accumulation, who was then eldest in blood inheritable by descent, and this they must do to entitle them to your Lordships' judgment.

I have much considered the arguments on behalf of the respondents. However it may be disguised, they all involve either an alteration in the will, as was made by Lord *Eldon*, or an addition to them, using the word eldest vice, or adding "of the eldest line" to the words "eldest male lineal descendant." To do either is contrary to the rule of legitimate construction.

It may be that the meaning I give these words leads to an unexpected result; but the litigant parties have the right to the application of the legal rule of construction, and the result is certainly not more contrary to the popular notion than the construction given by this House to the will, in *Trevor v. Trevor*.

My answer to your Lordships' first question is, that the devise is not void for uncertainty; as to your second, that the son of the third son would have been entitled to one of the lots, under the circumstances stated in the question.

I have to apologise for the great length of my opinion; but knowing that some of my learned brothers with whom I have long been in the habit of considering legal questions differ from me, I was anxious that the grounds of my opinion should be fully stated, in order that the error, if any there be, may be clearly observed.

Mr. Justice *Williams* :

In answer to your Lordships' questions, I have to express my opinion as to the first, that the devise is not void for uncertainty, but is capable of an intelligible construction; and as to the second, that the son of the eldest of the

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three sons would have been entitled if the devise had been of legal estates.

In construing the expression "eldest male lineal descendant," I am of opinion that the word "eldest" does not mean eldest in point of age at the time the conveyance is to be made; but that it means first in ordinary succession in the male line.

I think there is no weight in the argument that the natural and ordinary meaning of the word "eldest" is eldest in point of age, and that it is unjustifiable to substitute such a meaning as a conveyancer or other lawyer whose mind is habituated to established rules of descent and conventional limitations of real property would be led to adopt. The will is confessedly not the natural language of the testator himself, but the professional language of the conveyancer who was employed to draw it. Surely it is difficult to maintain that in construing such a will the same sense ought to be imputed to its language as if the subject of construction were a document of an ordinary kind, framed in natural language, and treating of untechnical matters.

Looking at the will as a whole, it seems to me plain, that but for the testator's desire that the property should accumulate, his wish would have been that his three sons should share it as tenants in tail male respectively, and that the purpose of the will was to limit the estates on that principle, as far as was practicable, after the accumulation had taken place. He meant, in short, that his estates should be enjoyed in tail male respectively, but to defer the period of enjoyment; and in carrying such an intention into effect, he did not mean that the ordinary succession in the male line should be disturbed. His intention that it should prevail is, in my judgment, sufficiently evidenced by the limi-

tation to the eldest, with remainder to the second, third, fourth, "and all and every other of the male lineal descendants then living of his sons successively in tail male." In other words, I fully agree with the opinion already frequently expressed by others, that the word "eldest" being employed relatively, and opposed to the subsequent limitations to the second, third, fourth, &c., is used as synonymous with the word "first," and that as the remainder over to the second, third, fourth, &c., is not expressed to be according to seniority or priority of birth, or the like; the proper inference is, that the testator meant to use the word "eldest" as meaning eldest in point of succession; more especially as to construe it to mean eldest in point of age might lead to a series of limitations of the most strange and improbable kind.

I do not propose to state more fully the reasons on which my opinion is founded, nor to deal with the particular arguments which have been adduced by counsel at your Lordships' bar; because, having been very recently apprised of your Lordships' wish that the opinions of the judges should be given on this day, I have not been able to perform that task in a way which I think would do justice to myself, or render any assistance to your Lordships.

Mr. Justice *Wightman* :

My Lords, the answer which I propose to give to the first question put by your Lordships is, that the devise by the testator, as stated in that question, is capable of an intelligible construction, and that it is not void for uncertainty. And to the second question, that in the case supposed, the son of the eldest son of *Peter Isaac*, though under age, would have been entitled to one of the lots, in preference to the sons of the second and third sons of *Peter Isaac*, though of full age.

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As the reasons for my answers to both the questions are in effect the same, I shall proceed to consider them together.

The questions turn upon the meaning to be attributed to the words “eldest male lineal descendant of *Peter Isaac Thellusson*,” as used in the will.

It has been decided, and is agreed, that by the words “male lineal descendant” is meant a male descendant through a line of males to the exclusion of a male descendant through females, and that whoever is to take is to take as a purchaser in tail male. So far the parties are agreed, but they differ as to the meaning to be attributed to the word “eldest,” as used in the will, in connexion with the words “male lineal descendant.” For the Appellant it is contended, that it is used in the will in what is called its ordinary and primary meaning of comparative age, and not, as contended for by the Respondent, in the sense of priority of descent over other male lineal descendants, or eldest according to the law of primogeniture.

Many references were made in the course of the argument to Dictionaries and other books of authority, to show that the word “eldest” might be and had been used in both senses, according to the subject in respect to which it was introduced; and the question, therefore, is, in which sense was it used in this will.

There is no doubt but that the words used in a will are to be understood as used in their ordinary sense and meaning, unless their use in such sense would not be consistent with the context of the will, or would lead to some illegality or absurdity, and they are capable of some other meaning which would be more consistent with the context, and clear of all illegality or absurdity, in which case they are to be understood as used in such other sense and meaning.

In the present case it was said for the Appellants, that the sole will was of so extraordinary and whimsical a character, that it might well be that the testator did mean and intend that when the period of accumulation ceased all the male lineal descendants of his son, *Peter Isaac*, should be assembled, and the oldest man amongst them selected as the object of his bounty designated by the will. The person selected was to take in tail male, with remainder, as was intended for the Appellant, to the second eldest, third eldest, and fourth eldest male lineal descendant of *Peter Isaac* then living (who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was directed to be limited) successively in tail male. It is difficult to give any intelligible meaning to such construction as would add the word "eldest" in the remainder clause to the words second, third, and fourth male lineal descendants successively; but if capable of being carried into effect, as contended for by the Appellant, it would ought require from time to time a re-assembling of the lists of male descendants, and on each such occasion selecting the oldest man amongst them, creating no small amount of uncertainty and confusion, which it can hardly be supposed that the testator intended, if the words used in the will are capable of a different meaning.

The construction contended for by the Respondent appears to me far more in accordance with the general scope and context of the will, and so much more reasonable that I cannot but think that it is the true construction, and ought to be adopted.

The testator, of foreign extraction, having made a large fortune as a merchant in *England*, and having three sons, appears to have been desirous of being the founder of three families great in point of fortune, and especially of landed estate; and to that end, by his will, leaves the bulk of his

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fortune to trustees, to accumulate during the lives of certain classes and persons living at his death, or born in due time after, and in the meantime the annual proceeds to be laid out in the purchase of land ; and when the period of accumulation ceased, the accumulated property was to be divided into three lots, one for the eldest male lineal descendant then living of his son *Peter Isaac* in tail male, with remainder to the second, third, fourth, and every other male lineal descendant of his son *Peter Isaac* then living (who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was by the will directed to be limited) successively in tail male. All the limitations are in tail male ; and supposing the testator to have intended that one lot should go to the heir in tail male of his son *Peter Isaac*, it is not easy to suggest any form of words that would better answer that intention. To devise the lot in express words to the heir in tail would be objectionable ; and the words used are certainly capable of such a construction as would fulfil the intention of the testator.

Whoever drew the will was obviously well acquainted with legal and conveyancing language and phraseology, and too much effect must not be given to the rule that the words used in wills are to be understood in that which was called their ordinary and familiar sense. In the will in question, the word “eldest” is used in connexion with the words “male lineal descendant,” and, placed as it is, was not, as it seems to me, intended by the person who drew the will to mean “eldest” in point of age, but eldest in lineal descent ; or, in other words, of the eldest line or branch. It is a rule that the same words in different parts of a will are to be construed in the same sense, unless the general intention requires a different construction.

In the advowson clause the same words are used, in

connexion however with other terms, rendered necessary by the nature of the property which would require to be dealt with before the period of accumulation would cease. The right of presentation is given by the testator to one of his sons in rotation, the eldest having the first right; and the like right is then given to the "eldest male lineal descendant" of his three sons, respectively, in the order aforesaid, he be capable by law; otherwise the eldest male lineal descendant of the next brother is to present. In this case the testator shows that he did regard priority of line and primogeniture, for the first right is given to his eldest son, and then the like right is given to the eldest male lineal descendant of his three sons respectively, in the order aforesaid, if he be capable by law. By the words, "in the order aforesaid," the testator appears to have meant that the eldest male lineal descendant of his eldest son shall have the first right, in preference to the eldest male lineal descendant of his second or third son. If this be so, and the testator has, in terms in this clause, preferred the eldest male lineal descendant of his eldest son to the male lineal descendants of his second and third sons, it can hardly be that this preference should not prevail amongst the male lineal descendants of the eldest son themselves, but that the oldest man amongst them should have the preference, and not the eldest in line.

If, then, the construction of the words "eldest male lineal descendant" in the advowson clause is that contended for by the Respondent, it would seem to follow as consequence, that the same words in the other parts of the will would have the same meaning. In an early part of the will the testator directs that his premises at *Plaistow* shall be sold, and says that, if sold by private contract, any of his three sons (a preference being given to the eldest in the choice, and in case of his refusal to the second

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son) shall be at liberty to become the purchaser; being another instance to show that he was by no means indisposed to give a preference and advantage to progeniture and the oldest line of descent.

That which is called the remainder clause was the subject of much comment upon the argument. The words are, "Remainder to the second, third, fourth, and other male lineal descendant then living (who shall be capable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited by my son *Peter Isaac*, successively in tail male." The construction put upon that clause by the Respondent appears to me to be the true one, and that the word "successively" is hardly compatible with the construction that has been suggested, that the remainder is to second eldest, third eldest, and so on. The words are descriptive of those persons who are to take after the first taker by purchase, not as purchasers, but in ordinary succession in the male line. When the words in the parenthesis appear to me to have been introduced, it may be, *ex abundanti cautela*, to provide that those who took in succession, under the succession clause, should not take as purchasers, but by way of limitation in succession, as suggested by Lord *Eldon*, in the case of *Oddie v. Woodford* and others (q).

Many cases were cited upon the argument, to which I forbear to refer; for, as has been truly observed, the provisions of this will, and the language used in it, are so peculiar, that no case upon the construction to be given to other wills can at all assist in the construction of this.

The will itself has, however, come in question in several cases. In the first of these cases, reported 1st N. Rep., 4th Vesey junior, 227, the general validity of

(q) 3 Myl. & Cr. 619, 620.

will, which was said to be void on the ground of remoteness, came in question. The case was carried to the House of Lords, and Judgment given, as it had been in the Courts below, in favour of the validity of the will. No objection appears to have been taken to the will upon the ground of uncertainty as to the persons who were to take under it when the period of accumulation ceased. As that objection, if it is one, might have been taken then, and was not, it may well be doubted whether it is competent for any one claiming through or under those who were parties to that suit to take it now. I am, however, of opinion, that there is no uncertainty in the will as to the person who is to take at the time when the accumulation ceases, for the reasons which I have already given.

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In the second of the cases in which this will was in question, and which is reported under the name of *Oddie v. Woodford* (r), the proper construction to be given to the language of the advowson clause, and incidentally to that of the devising clause, was considered both in the Court of Chancery and in the House of Lords; and, as far as the opinions then given by Lord *Eldon* and the other learned persons before whom the case was heard, have any bearing upon the questions proposed by your Lordships, they are decidedly in favour of the construction put upon the language of the devise by the Respondents.

Upon the whole, it appears to me that, upon the most reasonable construction that can be given to the terms of the devising clause, in connexion with the other clauses and language of the will, the word "eldest" used in it, as descriptive of the person who is to take a lot as a purchaser when the time of accumulation ceased, does not mean the oldest man amongst his male lineal descend-

(r) 3 Myl. & Cr. 584.

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ants, but that the testator meant and intended that the person who would be the heir-at-law of *Peter Isaac* in tail male should take one of the lots as purchaser, by the designation of his eldest male lineal descendant.

Lord Cranworth :

My Lords, this will has so long and so often been under consideration, that it is hardly necessary to refer to its terms very minutely.

[His Lordship having stated the material part of the will the condition of the family, and the question for the consideration of the House, proceeded thus:]

The *Master of the Rolls* decided in favour of the present Lord *Rendlesham*, and what we have to consider is whether his decision was right. I think it was. The sole question is, what interpretation ought to be put on the words occurring in this will, "*the eldest male lineal descendant.*"

On the part of the Appellant, it was contended that the common canons of construction compel us to say that by these words *Arthur*, the younger son of *Peter Isaac*, was designated, and not Lord *Rendlesham*, his grandson. The rule on which the Appellant relies is that universally recognized and acted on, namely, that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is perhaps involved in the former, for supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense. It was argued that here the context affords no ground for departing from the ordinary rule, and that there is nothing absurd in su-

posing that *Arthur* is the person intended to take. He is a male. He is a son of *Peter Isaac*, and so is a lineal descendant from him in the male line; and therefore at the expiration of the nine lives he was the eldest male descendant of *Peter Isaac* then living.

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I do not dispute the soundness of the rule of construction as stated by the counsel for the Appellant. It is a rule founded in good sense, and ought not to be departed from. But in my opinion, the context here does sufficiently show that the words were not used by the testator in the sense which the Appellant would attribute to them. I can hardly say, that it shows them to have been used, not in their ordinary sense, for in my opinion the sense which I attribute to them is their ordinary sense, at least as much as that contended for by the Appellant.

Looking to the whole will, it is plain that the object of the testator was to found at a distant day three great families, to spring from his three sons, and for the purpose of providing enormous wealth for their support, to suspend the enjoyment of his property, and to accumulate the whole income for a very long period of time. It is true that the accumulation was not to be continued quite as long as the law would then have allowed, but probably the testator, or his legal advisers, might think it safer, considering how closely they were pressing on the rules of law, to confine this unusually protracted accumulation to the lives of those whose descendants were eventually to be benefited by it, rather than to run the risk of increased legal difficulties if it had been made to extend over a greater number of lives, or a more lengthened period of time. I am aware that according to the construction which has been put, and I think properly put, upon the will, the accumulation was to continue during the lives of the female as well as the male issue (if there had been any) of his grandsons, and that

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female issue never could have succeeded to the proper But as the eldest grandson was only 11 years old w the testator made his will, it is probable that the contingency of his (the testator's) leaving at his death any issue in the generation beyond his grandsons never occurred his mind as worthy of attention. He probably was not aware that any accumulation had been directed beyond the lives of his sons and their sons born in his lifetime. The chances even by the accumulation which was directed were supposed to be, that every one of the three families would eventually succeed to wealth, equal to, or even beyond that of any other subject; and this might well satisfy the posthumous vanity of the testator.

That his object was, by an unprecedented accumulation to create enormous wealth for the purpose of founding three families is plain, but beyond that I can discover nothing in the will, indicating any capricious intention as to who should be the individuals to take the property. (On the contrary, all the provisions seem to show that he kept the ordinary rules of succession in his view. The gift was confined to males. The persons benefited are all to take estates in tail male only. The first choice of the estates after the trustees shall have made the division, is given to the representative of his eldest son; and the eldest son first, and then the second son is to have a preference presenting to any living. And so as to the male line descendants of each son in case of vacancies occurring after the death of the sons, but during the period of accumulation. All this seems to me to show, that subject to his strange plan of accumulation, the testator entertained the ordinary preference for the elder branch over the younger.

The consequences of the construction contended for by the Appellant in the event which has happened, would be

have been to postpone the estate in tail male of the present Lord *Rendlesham* to that of his uncle, they being the only male lineal descendants of *Peter Isaac*, to whom estates by purchase are limited by the will. The limitation is therefore presented to us in the least startling form which it could have assumed. But it is plain that, instead of only two persons to take as devisees in tail, there might have been ten or more, all standing in different degrees of relation to the testator and to one another; and the order in which they would have to succeed to the estate might, according to the construction of the Appellant, have been of the most anomalous nature. The first taker might have been succeeded on failure of his issue male, not by his brother, but by a remote cousin; and then on failure of his male issue, the estate might revert to its first channel, and the brother of the first taker might succeed. It is hardly possible to believe that the testator could have intended the whimsical shifting of the estates which might occur if the construction contended for by the Appellant should be adopted.

I do not forget, that every devisee in succession would be tenant in tail male, and so might acquire the fee, but he might have been an infant, and so incapable of interrupting the course of devolution supposed to have been chalked out by the will, or he might have desired to let the testators' intentions prevail; and it is hardly reasonable to argue that the testator can have capriciously created a very unusual and anomalous course of succession only because he foresaw that its irregularities might probably be rendered inoperative by the act of the first taker, who would be able to defeat all ulterior limitations, and indeed the circumstance that the first taker, when adult, might bar all the ulterior limitations, rather suggests an argument in favour of the construction which supposes the testator to

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have contemplated the usual mode of succession. For on that hypothesis the first taker would be likely to have less inducement to alter the course of succession pointed out by the testator, than if the limitations were to be considered as made in the capricious spirit suggested by the Appellant.

The testator might well have thought that if the first taker being the heir male of the body of the eldest son, should have no male issue he would not be indisposed to allow the estate at his death to go to a brother, or to whoever should then be the heir male of the body of the ancestor. But if the first taker was to be a descendant capriciously selected, according to the argument of the Appellant, the testator must have thought it most improbable that on the first taker dying without issue male, he should allow the estate to go over to the male descendant, who, on the extinction of the nine lives happened to be next in age to himself, who might be only remotely related, and perhaps hardly known to him.

Reading the will, therefore, with no other inclination as to its construction except that which naturally and properly arises from an unwillingness to attribute unreasonable or capricious intentions to the testator, when his language permits us to regard him as reasonable and not capricious, I think it clear, that if the words "eldest male lineal descendant" can, without violence, be taken to indicate the person who should at the specified time be heir male of the body of *Peter Isaac*, we are bound so to construe them. And I think they may fairly be taken as having that signification.

For in the first place the words to be interpreted are not it must be observed words which can be said to have any ordinary popular sense. They are eminently technical; the words not of the testator himself, but of his lawyer, dealing with a matter of a peculiarly technical nature.

It is therefore reasonable to suppose that they were with reference to the technicalities of the subject which they are connected. And being so understood, may reasonably be supposed to apply to descent in the line, according to the ordinary course of law.

The word "eldest" had not occurred, but the conveyance had been directed to be made to the male lineal descendant, I incline to think that that would have sufficiently indicated the heir male of the body. And how is it altered by the introduction of the word "eldest"? The appellant reads the will as if the direction had been conveyance to the eldest male descendant claiming in or through a male line. This is very nearly, but not, as I think, quite right. The direction is, as I understand it, to the eldest male descendant claiming in or through the line, that is the male line according to the course of descent. I use the definite not the indefinite

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The argument was founded on the words which follow the direction as to the conveyance to the eldest male lineal descendant, namely, the remainder to the second, third, and all and every male lineal descendant. But these words do not seem to me to create any difficulty. In the absence of the male issue of the eldest descendant in the line, the conveyance was to be made to the next in succession, and so on; these successive takers being not described as second, third, and so on. It was, according to my construction of the passage, immaterial whether the first taker was described by the word "eldest" or the word "first." He was to be the person entitled according to the ordinary descent in tail male. The first would necessarily be the eldest of his class, and whether he was described by the one epithet or the other,

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or simply as the male lineal descendant, was, as I think of no real importance.

The question mainly turns not on what construction is to be put on the word "eldest," but how we are to understand the other words, "male lineal descendant"? Do they mean a male claiming through any line of males, or a male claiming through *the* male line, that is the male line according to the ordinary course of descent? The latter is a construction not less consistent with the words than the former, and in far greater harmony with the general objects of the testator, to be collected from the words of the will. I am therefore of opinion, not disputing the general canon of construction, that in this will there is sufficient judicially to satisfy the mind that the Respondent, Lord *Rendlesham*, is the person designated by the testator under the words, "eldest male lineal descendant of *Peter Isaac Thellusson*."

Of course, the same principle applies in the case of the other moiety. The construction which gives one moiety to Lord *Rendlesham*, must give the other to *Charles Sabine Augustus Thellusson*, in preference to his uncle *Thomas Robarts Thellusson*.

I have formed my opinion as if the case was untouched by previous decision; but it is impossible to read Lord *Eldon*'s judgment in the case which arose on the advowson clause, without seeing that he considered the question on the construction of that clause to be the same as that on the clause now under consideration. That very eminent Judge, more than once, stated in delivering his judgment in that case, that he had earnestly sought for some grounds on which he might decide the question as to the right of presentation, different from those on which the ultimate right to the property would be founded, but that he was unable to do so, and his reasoning is almost exclusively

directed to the question of construction of the clause disposing of the property when the period of accumulation could have ceased. He points out emphatically that the case turned mainly on the meaning of the word "eldest" followed as it is by the subsequent words, "second, "third," &c. And he then reasons, in a very elaborate manner, for the purpose of showing that the word "eldest" could not reasonably be understood to indicate the eldest in point of age, but must be taken to mean "first," that is the person first entitled to succeed according to the ordinary rules of descent.

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His Honor the present *Master of the Rolls*, in deciding this case, considered, as I understand, that this decision of Lord Eldon in the case of *Oddie v. Woodford*, confirmed as it was by this House, conclusively established the right of the Respondent, Lord Rendlesham, in this appeal. I am assured that he was not right. But even if that was not so, the reasoning of Lord Eldon in favour of the decision which has been come to, seems to me so very strong, that I should have hesitated much before I dissented from it, and if I had not, independently of it, arrived at the same result.

I rejoice to think that in a case of this great importance we have the good fortune to concur with a large majority of the learned Judges, who, I trust I may be allowed to say, have reasoned on the matter with signal ability.

On the whole, therefore, the decree below seems to me to have been altogether right, and I consequently move your Lordships to affirm it.

Lord St. Leonards :

My Lords, in this case two questions were asked of the learned Judges : one whether the devise was void for uncertainty, and the other a question framed in order to

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obtain, according to the course of this House, the opinion of the learned Judges upon the general question, without exactly approaching the very point which the House had to decide.

With regard to the first question, I did not agree with my noble and learned friends as to the propriety of putting that question to the learned Judges, because I was of opinion that that point was concluded by former decisions of this House, and that the putting of that question would be really shaking, in some measure, the rule of this House, never to re-open a question which it has already decided. But as my noble and learned friends wished the question to be put, I withdrew my objection ; at the same time stating that when I should be called upon to deliver my opinion in this case, I should, for the sake of the jurisdiction of the House, mention that I was of opinion (as I still am), that it was not open to the House to put that question. My Lords, the matter stood in this way : in 1801 the original decree declared that the devises and limitations of the estates contained in the will were good and valid in law. The next of kin were parties to that decree, and were bound by it. They appealed against the decree to this House, and stated the decree fully, and they prayed that the decree might be reversed in the particulars they mentioned, which are all set forth in the petition of appeal. This House, in 1805, dismissed that appeal, and declared that the decree in the particulars complained of should be and the same was thereby affirmed. That decision of this House for ever excluded the next of kin or other persons representing the next of kin from again raising the question of the uncertainty of the devise.

Then the heir-at-law remained, and when the point came before Lord *Eldon* for decision, with regard to the advowson, he certainly rather encouraged an appeal by the heir-

at-law. Now the heir-at-law, Lord *Rendlesham*, upon that occasion, on the 24th of *June* 1821, presented to this House a petition, a very irregular petition, such a petition as was perhaps never before seen, stating that on the hearing before the *Lord Chancellor* it was suggested that the Court was precluded from entertaining the question of uncertainty by reason of the terms in which the decree in the cross cause and the affirmance thereof was drawn up, and that the petitioner was advised that the question of uncertainty was considered premature, and he submitted that the only intention of the Court of Chancery and of the House of Lords was, to declare that the trusts were such as might be carried into execution, and not to decide any question of construction as to the character of the estates, that the order of affirmance of the House of Lords could not be intended to give effect to that, and that proper words ought to be added to show the real intention of this House. The prayer of the petition was that "such words may be introduced or added to your Lordships' order of affirmance, declaring the true intent and meaning of your Lordships with respect to the matter aforesaid, as to your Lordships shall seem meet." Then came the cross appeal, and upon the 23d *June* 1825, that cross appeal was dismissed, with liberty to the Court of Chancery to direct how the costs should be paid.

The whole question, therefore, was concluded, both as regards the next of kin and as regards the heir-at-law, and, of course, as regards all persons claiming through either. Now, if the learned Judges had been of opinion that there was uncertainty in the devise, and if this House had been called upon to decide that question, we should have felt ourselves embarrassed by having asked the question. However, the answer of the learned Judges has been that which I expected it necessarily would be, that

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there is no uncertainty, and, therefore, that this House is not placed in that painful position in which it might have been placed in the other event. The only object I have in drawing your Lordships' attention to this point is for the sake of the jurisdiction of the House, and that this should not hereafter be quoted as a precedent for again asking questions on points of law which have been entirely concluded by the decisions of the House itself.

My Lords, the other question put to the learned Judges was to ascertain what is the real meaning of the will. It lies in a very small compass, and it depends upon the simple question of the intention of the testator. And I will observe upon what has been said with regard to a lawyer framing the will, and that if, in construing it, we are to be considered as adopting the lawyer's view, it is immaterial who draws the will, it is the will of the testator. If the will is drawn by an illiterate man, by a country schoolmaster, and you find attempts every now and then to use technical words in an absurd and improper sense, you know at once that the testator has not had good counsel, and you give a reasonable construction in order to carry out his intention, although it may be obscurely expressed. If a man has his will drawn by a learned and competent person who uses technical words, those technical words become the words of the testator, and they are to be construed according to his intention. Well, what is the intention of a man whose will is regularly framed in technical words? Why, that it should receive a technical construction. What is the object of words of science and art, except to prevent circumlocution, and to enable those who understand the science or the art at once to comprehend, by one expression, all that is intended? But here, when we come, as lawyers, to look at a technically drawn will, we are asked, and particularly

pressed at the Bar, not to introduce our own mode of thought into this will. That is to ask those who have to decide this case to divest themselves of their knowledge; to request them to unlearn all that they may have learnt of law. But, I say, this cannot be done, and you ought not so to divest yourself of your knowledge; you have to decide upon a technical will according to the meaning of technical terms. Shew me that there is any discrepancy in the words used, and that they do not admit of being taken in their technical and proper sense, then, beyond all doubt, technical words may, in such a case, be corrected by a clear intention shown in the will. Nobody who ever presided in a court of justice could be more willing than I am to give to words their natural import and force, whether they be technical or not. But when I have before me technical words, and I have to address myself to a will technically framed, I cannot help using that knowledge which enables me, at the mere sight of the document, to come to some conclusion as to its meaning, subject to its being altered by farther consideration. I inevitably, in spite of myself, come to a conclusion from the knowledge I have of what is meant by the words used; it is a language which I understand; I can construe it the moment I see it. To ask me, therefore, not to apply my own mode of thought to this will is to ask me to divest myself of my knowledge of law, and to come to it with a naked mind, and to consider it without those means and advantages of which I ought not to divest myself in coming to a decision.

Whether we look at this will in a popular view, or whether we look at it in a technical view, it strikes me that we must come to the same conclusion. I do not believe that in this country there is any man of good ordinary sense, although not a lawyer, who, knowing the ordinary

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modes of settlement in this country, which every educated man does know, would not arrive at the same conclusion at which the most learned lawyer would arrive. If we were in a different country the result might be different. There are countries, no doubt, in which a man would come to a contrary conclusion. We all know countries in which, at the moment of division of the property, they would collect all the heirs of the ancestor into a room, and call for baptismal certificates, and call out for the eldest male, without reference to the particular branch or line which he represented, preferring the oldest man in age to the younger man of the elder branch. Well, that may do very well in *Egypt*, but it will not do in *England*. We are here to construe an *English* will of real property in *England*, according to *English* settlements, and according to the mode of disposition by wills with reference to *English* property.

Now, if we look for a moment at what the testator has done, it is impossible not to be struck with the perfect clearness of every part of the limitation, according to the ordinary plan of limitations of real estate intended to be settled upon heirs male in the male line, that is, according to primogeniture in the ordinary way of settlement. Passing over, for a moment, the question, who is to be the person to take, just observe how consecutive everything is. That man, whoever he is, is to take an estate in tail male, and those who are to succeed him are successively to take estates in tail male. Then there are regular cross remainders in tail male. Then there are gifts over to others in tail male. There is a regular course of succession in tail male according to the ordinary course of settlement of real property in *England*. That is something in the case, but what is the ultimate remainder? The ultimate remainder is to the use of the trustees. There is a gift to one in tail male, if there should be only one, with remainder

to the use of trustees and their heirs and assigns for ever. Those words are afterwards repeated in declaring the trusts of the will. The learned Judges, when they were called upon to give their opinions to this House in *Oddie v. Woodford*, relied upon that general remainder, and Lord *Eldon* found fault with their opinion in that respect, because, he said, that the Court will look at what are the subsequent words, "and in default of the male issue of my sons as aforesaid." That, he said, would introduce the same question. I never could quite understand that, and I do not know that I understand it now. The testator begins his limitation at a given point, and then he goes through all the lines of issue male. When, therefore, he gives the remainder, he says naturally "as aforesaid;" that is, beginning at that point and going through them; but nobody can dispute this, that the remainder to the trustees is a clear vested remainder after the trust had taken place in default of all issue male of the testator. The words "as aforesaid" do not appear to me to operate against the general construction, that there is a clear remainder in fee after all the estates in tail male shall have ceased, a general, unlimited, uncircumscribed remainder in fee to trustees. That is only important as showing that the whole thing is disposed of in the estates in tail male, and the remainder in fee.

My noble and learned friend who preceded me seemed to think that it would be unimportant if the word "eldest" were out. I do not know that I am prepared to go to that extent; but I will take the will exactly as it stands. Now, the limitation is this. One part is to be conveyed to the use of the eldest male lineal descendant then living of his son, *Peter Isaac Thellusson*, in tail male. We are to remember that the testator was under this embarrassment. I do not talk now of the framer of the will, but of

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the testator. I consider this will as his will, though it is expressed in technical terms. It was an embarrassment which the best real property lawyer that ever lived might feel, how to describe the person whom he intended to be, the first taker.

The learned counsel at the Bar, with great ingenuity suggested words which, he said, the testator would have employed if this had been his intention. I should observe, in passing, that this case has been elaborately and well argued on both sides, and I ought not to omit saying, with my noble and learned friend, that I think we are deeply indebted to the learned Judges for their opinions, for I never read any opinions in which more mind was shown or more knowledge brought forward in support of the deliberate opinions which they have given to this House, from which this House cannot but derive great assistance.

The testator had to consider how he would describe the first taker. It is very easy, no doubt, at this time of day to find fault with the terms which are used, but I should like to see any lawyer, however learned, when called upon to introduce a limitation for this purpose, introduce one that would answer the purpose better than this does. I do not deny that there are other modes in which it might have been done, but I do deny that anybody could do it more effectually. I do not mean to say, that the words suggested by the learned counsel might not suffice, but I do mean to assert, that they would be open to at least as much argument as these.

I see that one of the learned judges said, that we must take the rule in *Mandeville's* case. But he is forced to admit, that that required some explanation, but if you are to take the rule from a case like *Mandeville's* (the limitation in which was very singular), and then you are to

superadd some explanation; it is a task which I should be sorry to undertake: you would then have to modify the rule in *Mandeville's* case by such words as to make it fit this case. In one of the papers handed up from the Bar, other forms of limitation were suggested, but they were clearly, in my opinion, more complicated and more difficult than the words of limitation we have here.

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It appears to me, that this will is framed with great learning and great accuracy, and, I must say, with great success: for, observe this, there is no will which ever came before a court of justice upon which so much learning and so much thought have been bestowed for the purpose of endeavouring to tear it to pieces and to counteract, and properly too, if it could be done, the ambitious views of this testator, who desires his sons to be content only with trade, to have no desire for riches, but to be content with what God might give them by the earnings of their own hands as a small portion, and then endeavours, in the persons of some distant posterity, to gratify his own ambition by building up families of enormous wealth. Courts of justice, for half a century, have been employed in discussing this will. Now, see how this will has withstood all attacks that have been made upon it. First of all, it was said to be uncertain. After arguments and repeated decisions in the courts below and in this House, that objection has been overruled; the will has been decided not to be uncertain. Then it was contended that the accumulation went beyond the period that the law allowed. No point was ever argued more elaborately than that was, and it was decided in favour of the will, that the testator had not gone beyond what the law allowed, and it was found necessary to pass an Act of Parliament in order to prevent other persons from following the pernicious example which the testator had set. Then came a question,

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and a great question it was, whether males could take through females, or whether the gift was not entirely confined to males, claiming through males. Upon that there was great argument, both below and in this House, and after great argument, it was decided that, according to the testator's clear intention, and according to his clear words, males claiming through males alone could take. The question came this question, and supposing it to be decided, as I apprehend it will be, in favour of the view of my noble and learned friend who moved the rejection of this Appeal, it will then be decided, that the person entitled as the eldest male lineal descendant is the person entitled according to the rule of primogeniture. In this way, every one of the great points (and every one was a great point) raised against this will has failed. Notwithstanding the desire that every court of justice has had to put a limited and strict construction upon this will, the law duly administered has compelled the courts to give effect to the testator's intention.

Now, my Lords, I come at once very shortly to the question, who is the person who is first to take. I have shown your Lordships something of the difficulty which the testator had to contend with, and I know no mode which was left to him of carrying out his intention after those to which I have referred, except that which the testator himself has adopted. First of all, we know that he took primogeniture as the foundation. He gives to his eldest son the first choice, and so in the same manner in the advowson clause he takes his eldest son first of all. The words are, "to the use of the eldest male lineal descendant then living of my said son *Peter Isaac Thellusson* in tail male." Now, to stop there, if in those words you construe "eldest" as "first in age," you must go on throughout the whole will and construe the "second and

third, fourth," and so on, as meaning the second, third, fourth, and so on in age, instead of second, third, and fourth who are most worthy according to primogeniture. Now it is very observable that one of the learned Judges who differs in opinion from the majority, in order to support his view of the case is forced to introduce the conjunction "and." He introduces the word "and" into the disposition in order to give it the construction for which the Appellant contends. In the construction which I advise your Lordships to adopt, you alter no words. It was very ingeniously and elaborately pressed at the Bar that we have to alter the words to support the construction of the Court below. I deny that; you can read the will as it stands, and give a construction to the words as they stand without altering them. The word "eldest" has its operation upon all the words which follow, but you may give a sense to that word without the slightest necessity for introducing another word as a substitute to enable you to carry the intention into effect. The words are "eldest male lineal descendant." The testator uses those words, and never departs from them in any one instance. He uses the same words over and over again in every instance in which they ought to occur. He must therefore have had a clearly defined intention in his own mind as to the meaning of those words. They are not introduced lightly or without due caution and care. He does not use one expression in one place, and another in another; the will is consistent throughout. He never speaks of the person who is to take, but as "the eldest male lineal descendant." Then every word which precedes "descendant" is necessarily a part of the description. He must be "eldest," he must be "male," he must be "lineal," and he must be a "descendant." It is not "descendant" merely that is in question, or "male"

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or "lineal" or "eldest," but he must be "the eldest male lineal descendant."

Now, beyond all doubt "eldest" to start with, admits of two interpretations. It may mean eldest in point of age without reference to primogeniture. But in reference to settlements the word "eldest" never means that. Here we are upon a settlement of real estate. Does any man who is competent to form a judgment upon this case doubt this, that if the testator had not had a long accumulation in view, thus providing for a first taker, as to whom when he made his will he could not predicate who would fill that character, can any man doubt that he would have taken at once the eldest son of *Peter* as the first tenant in tail male? It is utterly impossible to doubt it without throwing over the whole frame of the will; no lawyer, nor anybody looking at it popularly and with a common understanding, can doubt it. Then "eldest" being, as I take it, in the general sense, the most worthy according to primogeniture, I see throughout every portion of this will the distinct character of primogeniture marked in every provision. Taking it not only as a lawyer would read it, but according to its popular sense, I deny that in such an instrument as this the word "eldest" means eldest in point of age; I say it means the most worthy in regard to primogeniture, the most worthy in reference to the line of limitations that we find in the instrument.

Then as to the word "male," the meaning of that was thought for a long while to be very doubtful, but it has been held to mean males claiming through males. Full effect, therefore, must be given to that.

Then "lineal." Why is this word introduced, not once, casually or by mistake, but always? What does it mean? It means the line. What is the line? The line of primo-

geniture. What other line can it be? The moment you adopt the Appellant's argument and take age you lose the line. No doubt there is a person from whom they all spring, but you discard the line. And I would ask this, if what has been argued by the Appellant was really the intention of the testator, where is the indication of it; such a thing never having been seen in *England* in any one disposition that ever was brought into any court of law; no lawyer ever having seen such a thing; it being against the character of the country, and against the institutions of the country; then, where is any such intention shown here? If this testator had such an intention would not you expect some declaration of it. Would not you expect something to indicate so very unusual a proceeding as to bring all the heirs male into a room, and then call for the production of their certificates of baptism and take the oldest man in the room, whatever portion of the line he might represent? He cannot be called the "eldest male lineal descendant;" he belongs to the line, it is true, but he is not in that branch of the line which the testator has pointed out. There is not a single expression in the whole will to indicate such an intention; on the contrary, as the testator's object was length of accumulation, if he had been asked which he preferred, without reference to the common mode of settlement, he would have said, the youngest; "I shall have the boy; the boy, during his minority, cannot break the settlement, and I shall have another accumulation which the law does not admit expressly, but which indirectly I shall gain. I shall have another course of settlement, another accumulation, it may be for twenty years, by the operation of the law itself." I have no doubt he would have chuckled at that sort of consequence of the law, which he could not gain directly by his own act, but which the operation of the law itself would effect for him.

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Then if it is, as I think it is, perfectly clear that the words mean that which the Respondent contends for, that is, the "eldest male lineal descendant," being the eldest male claiming through males of a particular line, then come the other words of limitation to second, third, fourth, and so on successively. You have a regular course of limitation after the first taker.

'Then I think the word "successively" points clearly to the ordinary course of limitation. Now in this branch of the will I confess I can see nothing which breaks in upon the harmony of the will, because, if this construction is the true one, it introduces no new words, nor any unknown or peculiar limitation. The moment that you decide that primogeniture was meant, that instant all difficulty is removed. If you adopt the Appellant's view, then a new question arises at every moment. You must cross from youth to manhood, and from infancy to old age. You must find out, as well as you can, who is the proper party. Nobody can tell that; it is impossible for any one to tell it without inquiring of the members of the family. When it goes in the direct line of primogeniture, you may easily know who are brothers and brother's sons, and so on; but everybody does not know the more remote relations. There would be very great difficulty indeed in finding out the proper persons.

Nor do I think that any aid is derived from the argument that the testator desired to render it impossible before the moment arrived for the division, to ascertain who should be the party entitled to take, because I think the uncertainty of life and the course of events over which he could have no control after he had made his will, and the length of time and number of lives which might pass away, must all have rendered it so uncertain, that no man could predicate to himself who should be the person to take.

Now the advowson clause has been very much relied upon. I do not myself think that it can, in any possible way, militate against the construction which I am advising your Lordships to put upon this will; but I do think that it does admit of an interpretation very favourable to it. The question was raised upon this advowson clause, upon the former appeal before your Lordships, and the Judges were asked this question among others: "Having such regard as aforesaid, if the eldest deceased son of the testator had had a son deceased, and by that son a grandson, who when the living became vacant was an infant, and the second deceased son had a son deceased, and by that son a grandson, who when the living became vacant was of the age of 21 years, and therefore of the two grandsons the latter was, in a sense, 'the eldest male lineal descendant,' would the infancy of the grandson of the eldest son, or the circumstance that the grandson of the second son was of age and older than the grandson of the eldest son, give the grandson of the second son a right to nominate or present to the living?"

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The answer of the learned Judges to that question is this (s). "In conformity to the opinion upon the first question, we are farther of opinion that the infant grandson of the elder brother would have a right to nominate or present, in the case supposed in the second question, to the vacant living, and not the adult grandson of the second brother. Upon this hypothesis, we think the nomination will necessarily belong to the infant grandson of the elder line as the person unequivocally pointed out, unless the provision made by the testator for carrying the nomination into the second family in case the descendant of the first son should be incapable by law of making the nomination,

(s) 3 Myl. & Cr. 630.

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should in the circumstances stated, have that effect. The words are, the nomination to be made by the eldest male lineal descendant of his said three sons respectively, in the order and rotation aforesaid, if he be capable by law of making such nomination when the church becomes vacant or within due time afterwards, otherwise the eldest male lineal descendant of the next brother is to present to such living. The infant grandson of the eldest son is the person clearly pointed out to make the first nomination, and we think, notwithstanding his infancy, he is by law capable of making such nomination. He therefore fulfils precisely all the conditions annexed by the testator to the gift of this authority, and sustains precisely the description and character of the person to whom it is given. It has been argued that the testator in his provision respecting legal incapacity pointed at infancy, and that his provision is to be understood as if he had directed that the descendant of the second brother should present if the descendant of the eldest brother was an infant. Nothing in the provision nor in the will entitles us to do such violence to the testator's language; the expression may have been used either from a doubt respecting the state of the law as to the presentation by an infant, or to guard against the effect of other incapacities, such as lunacy or outlawry, or others that might be stated. Either hypothesis is sufficient to satisfy the provision, and to leave the words creating and bestowing the authority to their natural operation."

The learned Judges were therefore clearly of opinion that this clause did prefer the line of primogeniture, and I think they came to a right conclusion. There is, of course, this difference between the advowson clause and the limitations with regard to the disposition of the property, that here you have the sons introduced; in the other the sons are excluded. Now observe here, he directs them to pre

sent "a fit and proper person, who shall for that purpose be nominated by one of my said sons in rotation, the eldest having the first nomination." Now, "eldest" there decidedly means eldest with reference to primogeniture; there can be no doubt about that. Then he goes on to say, "and the like nomination to be made by the eldest male lineal descendant of my three sons respectively in the same order and rotation aforesaid." The limitation is, therefore, first to the eldest of his sons, and to the eldest male lineal descendant of that son. It is impossible to say that "eldest male lineal descendant" does not mean there the heir male of the line according to primogeniture. The three sons are clearly to take in the course of succession according to primogeniture. By the decision of this House, and by the opinion of the Judges, it has been held that the words do not exclude infancy. We see that the testator was himself disposed to look at infancy as a probable event. For it is to go to the eldest male lineal descendant, "if he be capable by law of making such nomination when the church becomes vacant, or in due time afterwards." Can that, by reasonable construction mean anything else than that, being an infant under 21, he may perhaps attain his majority before it is necessary to fill the church? Then what does this show? It shows this, that he preferred infancy in the immediate line of primogeniture to age, because he gives a preference to an infant, if he be capable of making the nomination in due time, over a person who may be 60 or 70 years of age if you like, the son of a second brother. He does not, therefore, at once send it over and say, "If he is an infant I will have nothing to do with him; I want age; I may find age in the second son's line;" but he provides against what he believes to be the disability of infancy; still, the eldest son of the first son is, the moment he attains 21, entitled to the benefit of presenting to the advowson. Therefore,

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although I admit that it is difficult to come to a satisfactory conclusion upon this advowson clause (I have read very often and considered it very much), still I think it is drawn by the hand of a master, and looking at it with reference to the whole will, it bears, in my opinion, a construction which harmonises with the other parts of the will, and your Lordships put that construction which I now submit to be the true construction. You will put all the parts of the will in harmony with each other, according to what I believe, in my conscience, the testator intended. And therefore, without taking up more of your Lordships' time, I second the motion of my noble and learned friend, that this appeal be dismissed.

There was a question raised by the *Solicitor-General* with regard to a portion of the accumulation. I have looked into that point, and I see no ground for making any exception of that portion.

With reference to the question of uncertainty, I have already shown to your Lordships that that question was entirely concluded by the former decision of this House; and therefore it is a question what should be done as to the costs of that part of this appeal; because, undoubtedly, the appeal on that issue ought never to have been presented, inasmuch, as I have already stated, it is impossible that that question could be disturbed. But your Lordships have so far given attention to it as to ask the learned Judges to give their opinion upon that point. And they have done so. That, therefore, rather puts those parties in Court, if I may say so, when they ought, in my opinion, to have been put out of Court; but as throughout this litigation the Court has seen fit to throw the costs upon the estate, I certainly should not propose to visit the next of kin with the costs of their appeal, although in strictness it ought to be done, for the sake of the jurisdiction of the House.

Lord *Wensleydale* :

My Lords, I concur in the advice which has been given to your Lordships by my noble and learned friends who have preceded me, and agree with the six learned Judges who have favoured us with their opinions, and shall state the grounds of my opinion as shortly as the nature of the case admits.

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I entirely agree that to the words in this will we must apply the rule of construction, now, I believe, universally adopted in *Westminster Hall*, that in construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance, or to some inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance, or inconsistency, but no farther: *Warburton v. Loveland* (t). The rule is laid down by Sir *James Wigram* in somewhat different terms in his admirable work on the reception of parol evidence. Proposition the first is, that the testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context it appears that he used them in a different sense, in which sense they are to be construed. I do not think that a different rule is to be adopted in construing a will prepared by a lawyer and one penned by an ordinary individual. But if technical words are used, by whomsoever they are written, they must be considered as used with their technical meaning, unless the testator in the context shows that he meant to use them in a different sense.

The important question upon which the case before us

(t) By Mr. Justice *Burton*, 1 Hudson & B. Irish Cas. 648. See 2 Dow. & Clark, 480.

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turns, is what is the meaning of the words "the eldest male lineal descendant" of *Peter Isaac Thellusson* living at the time the trust for accumulation ends, to which descendant, in the events which have happened, one moiety of the lands is to be conveyed in tail male.

The words "male lineal descendant" have already received one judicial construction by this House, by which we are unquestionably bound; they mean a male descendant claiming entirely through males.

The sole question, therefore, is to the meaning of the word "eldest" applied to such male lineal descendants with the context in this will. The word "eldest" is certainly capable of more meanings than one, as the term "elder" is. In Dr. *Johnson's* Dictionary this word is said to be the comparative of old, changed to eld, and two of its meanings (the only meanings necessary to be considered in this case) are "surpassing in years" and "having the privileges of primogeniture." In which of these two senses is it to be read in this place? I think it can hardly be disputed that in its primary, that is, as I conceive, its original or *primâ facie* sense, or its strict sense (to use the words of Sir *James Wigram*), or perhaps in its ordinary and grammatical sense (to use those of the common rule), is "surpassing in years," or is that person or thing which has existed the longest time, and when the word "elder" or eldest is used alone, or with reference simply to an individual person, the "eldest" man, for instance, it means eldest in years. But if applied to an individual having a particular character, it has a different meaning. The "eldest" or "senior magistrate," or "officer" does not mean that magistrate or officer who has lived the greatest number of years, nor indeed always him who has filled the office for the longest time, for it may indicate rank only.

So by the term “the eldest Earl of *England*” is not generally intended the Earl the most advanced in years, but the eldest in point of family origin—the premier Earl.

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If then we had to construe a devise simply of an estate to the person who, in a given time, should be the eldest male lineal descendant then living of a given person, without the aid of any context, it might be a question whether we ought to hold these words to mean, the eldest, in point of years, of the descendants of that person, all claiming through males, or the eldest *qua* lineal descendant, that one having the right of primogeniture, being the eldest in heritable blood of the male line—the eldest in the ordinary descent of estates.

It is not necessary to decide what the meaning would be of those words alone in such a simple devise. I am inclined to think, that being used with reference to a line of male lineal descendants, it ought to be understood to mean, not the eldest *man*, or the eldest *in age* amongst the male lineal descendants, but the eldest *qua* male lineal descendant—the eldest in heritable blood in the male line.

. But when these words are to be construed in this will with such a context as they have, I must say that I cannot entertain a reasonable doubt as to their true meaning. If we were to construe them as meaning the eldest in age, we should attribute to the testator, who, from the previous provisions in his will, appears to have had great family pride, and to have wished to found three families with hereditary succession in tail male, the strange and fantastical design to select the eldest in point of years of the male lineal descendants to be the head of the first branch of each family, with remainder to the next then eldest, and so on in all the male descendants then living, according to seniority of years only, at the time of the determination of the accumulation. The youngest branch might take the

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first, the eldest second, the third the fourth, the fourth the third, and so on, as the ages of the different individuals of those different branches might happen to be at the period of division. Now, this must strike any one as extremely eccentric, and unlikely to have entered into the contemplation of a man of ordinary sense and reason. It is quite true that the singularity and apparent absurdity of a testator's intention will not prevent its taking effect, if his meaning is clear; but if the words are capable of bearing two constructions, one which would make the bequest probable, and consistent with the rest of the will, and another which is strange and singular, and approaching to the absurd, the former ought certainly to be adopted.

If the testator had intended to make the strange and whimsical provision which is attributed to him, he would naturally have said the eldest *man* or the eldest *in age* among the male lineal descendants. And then undoubtedly his intent must have been carried into effect, and its strangeness and eccentricity would not have prevented its operation. But the words used are not only quite consistent with the reasonable and probable intent to prefer the eldest in point of blood, but probably ought to be held to have that meaning without any context, and, with the additional context to explain them, there seems to me to be no reasonable doubt as to their meaning.

The remainder is to the *second, third, fourth*, and all and every other male lineal descendant or descendants then living of *Peter Isaac Thellusson* successively in tail male. The words "second, third," &c., are used relatively to the eldest. And it is much more reasonable to hold that they give the sense of first to "eldest," that is, first in respect of primogeniture, or first in blood inheritable by descent, rather than that the word "eldest" is to qualify the words "second and third," and to cause them to be read as second

oldest, third oldest, &c. And if the testator had intended to give the estate according to their respective ages, one cannot doubt he would have used the words *second in age*, *third in age*, &c., or an equivalent expression.

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I think, therefore, that the true construction of the clause in question is, that the “eldest” means, not eldest in years, but in the priority of succession, eldest in inheritable blood.

It was, however, urged by Sir *Richard Bethell* in his most able argument, that what has been termed the “parenthetical clause,” on which he mainly relied, explained in what sense the word “eldest” was used, because that clause, on the supposition that it meant the *most aged*, was useful and indeed necessary, but that if it meant the eldest in respect of *primogeniture* it was useless.

I do not think that if considered as surplusage it would be of much importance in such a case as this. But if I rightly understand his argument, the parenthetical clause was as necessary and useful in one supposition as the other. If “eldest” is to be taken as the *most aged*, it might happen that at the period of division the descendant who was eldest in point of years might have an eldest son, who might be the next eldest, older than all the other descendants of *Peter Isaac Thellusson*. The clause requires that in that case such eldest son who would be capable of taking as heir in tail of his father, should not have a remainder limited to him in tail as a purchaser.

But suppose the term “eldest” to mean the *eldest having the privilege of primogeniture*, the eldest in heritable blood, his eldest son might be considered as a second descendant in the same sense, the second in the line of heritable blood. And it would be as useful and necessary to introduce the clause in this case as in the other.

It may be fit to notice another argument that was used

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at the Bar in favour of the hypothesis that the testator meant the eldest in age to have the estate at the expiration of the time of accumulation. It was said that his object was to cause a greater uncertainty as to the person who was to be entitled, and thereby to diminish the chance of anticipation by sale of the future interest. It is true, indeed, that if the eldest in age was to take, he would at any given time have a worse chance of succeeding to the estate, because it was less likely that he would survive the lives during which the accumulation was to take place, than the eldest in blood if he was to take, save in the case of his happening to be the same person, and would be able to sell that chance for less than the eldest in blood, and in that respect would be less likely to anticipate. This supposition is, however, very fanciful and improbable. The chance of anticipation would depend, not upon the value of the interest (for each person could sell it for its true value), but upon the habits, character, and pecuniary circumstances of the person entitled, of which the testator could not possibly form an opinion. I think it cannot be for a moment supposed that an idea of this sort could have entered into his mind.

As to the advowson clause, opposite inferences have been drawn on both sides by the learned Judges, Mr. Justice *Crompton*, Mr. Justice *Byles*, and Mr. Justice *Wightman*, on the one side, and Barons *Martin* and *Bramwell* on the other. On the supposition that the testator thought that infancy was a disqualification, I think any argument derived from this clause, on one side or the other, is very unsatisfactory, and ought to be entirely rejected; and, indeed, the learned Judges respectively do not seem to place much reliance on this clause.

Nor do I think it necessary to advert to the numerous cases of the construction of other wills with different words,

which were quoted at great length at your Lordships' Bar, and with no advantage. And I quite agree in the observation of Sir *Richard Bethell* as to the inutility of attempting to illustrate the words of one will by those of another. Cases as to the construction of the words "elder" and "younger" son throw no light whatever on this.

The result, in my opinion, is, that the word "eldest" is, in this will, from the subject to which it refers, and the whole context, to be construed in the sense, not of oldest in point of age, but eldest in point of primogeniture, eldest in heritable blood. And I agree with Mr. Justice *Crompton*, that looking at the whole will, the construction by which the estate goes, as it would have done if the estate tail had commenced earlier in the succession, is the one in accordance with the general scope of the will, and that the construction according to which, at the end of the period of accumulation, the estates are to be conveyed and the remainder limited according to the relative age of the descendants, is so strange, fantastical, and little reconcilable with the clear intention of the testator to make three family estates, each to descend in the usual way of limitation of large estates, that it ought not to be adopted without the clearest possible words incapable of any other rational construction. And the words in the will are clearly not of that character; quite the contrary.

With this opinion, it is hardly necessary to say that I think it impossible to hold that the will is void for uncertainty. And it becomes unnecessary to consider the objection of my noble and learned friend opposite, that that question is already concluded.

I have made up my mind upon the great question in the case on considering the will itself; but it is a great satisfaction to know that the result accords with the much considered opinion of Lord *Eldon* in *Oddie v.*

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Woodford (t) and with that of Mr. Justice *Buller* expressed in the case of *Thellusson v. Woodford* (u).

It remains to observe, upon a point suggested by the *Solicitor General*, viz., that there is an intestacy as to part of the trust funds. The trust is to employ the personalty in the purchase of real estates, and then to collect the rents and profits, both of the lands devised and of the lands purchased as aforesaid, and invest the money arising from these rents and profits in similar purchases, and then to collect and invest the rents and profits of those lands so purchased as last aforesaid, in the same manner as those of the lands devised and first purchased. He contended, that there is no trust as to the rents and profits of any lands purchased with the rents and profits of the lands secondly purchased. A similar argument was used as to the money arising from the sale of timber on the estates secondly purchased. The direction is to cut down timber upon the lands devised and *those directed to be purchased*, and sell the timber and lay out the produce in the purchase of other estates.

I think it clear, that this includes the timber upon all the lands directed to be purchased at any time, and purchased at any time, either first or secondly, and that there is no intestacy as to the produce of the sales of timber. I think it clear also, that the clause empowering investment in the funds *until* a proper purchase was to be made, applies to the rents and profits of all the lands purchased under the directions of the will, whether purchased first or secondly, or at any other time, and, therefore, implicitly authorises the investment in land of all the rents and profits of all the estates. The objection, therefore, of the *Solicitor General* cannot prevail.

(t) 3 Myl. & Cr. 584. 596.

(u) 4 Ves. Jun. 376.

I, therefore, entirely concur in recommending your Lordships to affirm the Judgment of the Court below. As to the costs, I think they ought to be paid out of the estate.

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Lord Brougham :

My Lords, not having had the advantage of hearing the whole of the argument, I purposely abstain from taking any part in the decision farther than to state that I entirely agree with my noble and learned friends in the conclusion at which they have arrived, from all my recollection of that large part of the argument which I did hear, and from reading the opinions of the learned Judges.

The learned Judges differ upon this subject: the two views principally taken, which were most ably argued at the Bar, and which have been most ably argued on either side by the learned Judges, relate to the question whether "eldest" is to be taken to mean oldest in point of years, or first in point of lineal male succession. Both those views have been fully and elaborately argued; and I quite agree with my noble and learned friends in the opinion at which they have arrived upon that question.

My Lords, that there is any room for holding the will void for uncertainty, that there is any ground for saying that no intelligible construction can be put upon it, I deny, and also that there is any ground for saying (which is a barely possible case to happen) that the two conflicting opinions are supported by reasons so accurately and nicely and completely balanced, that it is impossible to decide either way, in which case the will might be said to be void for uncertainty, but no such case as that arises here. The arguments were most ably stated at the Bar, and they have been most ably stated also by the minority of the learned Judges, Mr. Baron *Martin* and Mr. Baron *Bramwell*,

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for the construction of oldest in point of age; but taking the arguments on the other side, without regard to the weight of authority, and having regard only to the weight of argument, I am clearly of opinion that there is no balance whatever, but that the preponderance is decidedly in favour of the view taken by the majority of the learned Judges.

I am, therefore, of opinion, that my noble and learned friends have come to a right conclusion, and that the proposition of my noble and learned friend who spoke first, to affirm the judgment of the Court below, ought to be adopted.

The Lord Chancellor :

My Lords, having been counsel for one of the Appellants in the Court below, and having also signed the case and the reasons for the Appeal to your Lordships, I determined that I would take no part in the decision, unless it should happen that there was an equal division of opinion amongst your Lordships. Fortunately there is an unanimous concurrence of judgment amongst your Lordships, and, therefore, I think it proper to decline to express any opinion on the subject, but I thought it right to give this explanation, because from the position which I have the honour to hold in your Lordships' House and from my having been present during the whole course of the argument, it might otherwise have excited surprise that I should take no part in the Judgment in this most important case.

My Lords, I wish to make one observation with regard to an objection which has been taken by one of my noble and learned friends to a question which was put to the learned Judges as to the devise being void for uncertainty. My Lords, I quite agree with my noble and learned

friend, that it would be highly improper to refer any question to the learned judges, or to permit any discussion upon it which had been finally decided by your Lordships' House. But the impression upon the majority of your Lordships' minds at the time when we were framing the question for the learned Judges was, that the point as to the uncertainty of this devise had not been finally decided; that as circumstances stood at the time of the former Judgment, the House could not come to any final decision upon that point because events might possibly arise, in which, if there should be any uncertainty then existing, it would be entirely removed by the fact of only one person remaining, who would be the person designated by the words in the will. My Lords, I have thought it right, as the objection has been taken by my noble and learned friend, to explain the reasons why, as your Lordships may recollect, you framed that question for the opinion of the learned Judges; and I cannot help thinking that it was right that we should do so, and that the question had not been finally decided upon which they have delivered their opinion.

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Lord St. Leonards :

My Lords, I wish just to put your Lordships right upon this point. There might be questions of construction to arise, but I must deny that any question of uncertainty could ever arise upon this will, after what had taken place. That point was entirely concluded and set at rest by the decision of this House. Many questions of construction might be raised, but none of uncertainty. The decision of this House appeared to me to be perfectly conclusive upon that, and therefore it was that I protested against what I thought might be hereafter quoted as a dangerous precedent, of calling in question a deliberate decision of this House.

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Lord *Cranworth*.—My Lords, I only wish to say, in confirmation of what has fallen from my noble and learned friend on the woolsack, that it certainly did not appear to me that the decision of this House, in the former appeal, had finally and irrevocably determined that in no event which might happen, could there be an uncertainty. At the time when the House said that the will could not be considered void for uncertainty, there was a possibility that the whole estate might eventually vest in one person. The House could not say that that event might not happen. If it did happen, there could be no uncertainty. At the same time it might have been the opinion of the House, that if the events should happen which have in fact happened, there would be an uncertainty. I rather wished to explain this, because I quite concur with my noble and learned friend, that it would be extremely wrong for this House ever to re-open a question which has been once decided. If the House erred in so interpreting what was done 20 years ago, that was a mistake undoubtedly ; but it was not my opinion that we were erring in that respect. I think we put a right construction, and took a right view of the former judgment ; but I cannot doubt that the House will concur (as I quite concur), in what has fallen from my noble and learned friend, that it would be most improper for the House ever to re-open a question that has been once decided.

Lord *Wensleydale*.—My Lords, I quite concur with my noble and learned friend on the woolsack, and with my noble and learned friend opposite, that this was a very proper question to put to the learned Judges, because at the time the case was before the House on the former occasion, it might have happened that when the period of distribution arrived, the same man would be both eldest in point of age, and eldest in point of heritable blood, and

therefore I think that question could not be concluded by anything that had previously passed in this House.

Lord *St. Leonards*.—It was a question concluded against the next of kin and the heir at law that there was no uncertainty.

Decree affirmed. Appeals dismissed, with direction that the costs of the appeals should be paid out of the estate.

THOMAS H. EVERS and Others - *Plaintiffs in Error*.
THOMAS CHALLIS - - - *Defendant in Error*.

Though a gift over may as to one alternative operate as an executory devise it will not necessarily do so as to another ; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder.

The invalidity of one alternative will not necessarily defeat the other.

Devise to *E.* for life, "and from and after her decease to such child or children as she may have, if a son or sons who shall live to attain the age of twenty-three, and, if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common, &c. ;" and in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. And in case *E.* has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daughter. "And also, in case *E.*'s children shall die under" the ages mentioned, "or if she has none," then to *J. A.* and *S.* for life, and afterwards to their sons and daughters on attaining the above ages respectively. There were similar devises to *J. A.* and *S.*, but in the devises to *J.* and *S.* nothing was said as to total absence of issue ; in that to *A.* the words used were "and farther, in case *A.* shall die without issue." *E.* first and *A.* afterwards died without ever having had a child :

Held, That on the death of *A.* the gift over in favour of a daughter of *J.*, who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of *A.*) determined the contingency on which the remainder was to take effect, had occurred :

Held also, That though the gift over, on the death of *E.*'s sons under

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living to the age of twenty-one years, his, her, and their heirs, executors, administrators, and assigns, if more than one, in equal shares as tenants in common, and, if only one child, to such only child, his or her heirs, executors, administrators and assigns. And, farther, in case of the death of my said son, or either of my said two daughters, without leaving a child, if a son, who shall live to attain the age of twenty-three years, or if a daughter, who shall live to attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daughters having issue, if a son or sons living to the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years; if two of my said last named children have such children or child, to them, his, or her heirs, executors, administrators, and assigns, as taking in equal shares from his or her father or mother, his, her, and their heirs, executors, administrators, and assigns; and if only one of them, my said son and two daughters, leaves issue that lives, if a son or sons to the age of twenty-three years, if a daughter or daughters lives to attain the age of twenty-one years, then I give the whole of such last mentioned estate and premises unto such issue, if more than one, in equal shares, their respective heirs, executors, administrators, and assigns, and, if only one, to such one, his or her heirs, executors, administrators, and assigns at the ages aforesaid. And it is my desire that the rents, produce, and profits of the said last-mentioned premises shall, after all deductions for the purposes aforesaid, be applied for or towards the maintenance and education of the children of my said daughter *Elizabeth Maria*, and of my said son and two other daughters' children until entitled to the said estates and premises." The testator afterwards made a codicil, which, however, did not affect the preceding dispositions.

my said daughter *Elizabeth Maria* may have, if a son or sons, under the age or ages of twenty-three years, or if a daughter or daughters under the age of twenty-one years, the share or shares of such child or children so dying to go to the survivors and survivor of such child or children attaining such ages, if more than one, their heirs, executors, administrators, and assigns in equal shares as tenants in common, and in case my said daughter *Elizabeth Maria* has only one child, if a son that shall live to the age of twenty-three years, or if a daughter that shall live to the age of twenty-one years, I give all the said last-mentioned premises unto such only child so attaining such age, his or her heirs, executors, administrators, and assigns. And also in case all the children of my said daughter *Elizabeth Maria* shall die, if a son or sons under the age of twenty-three years, or if a daughter under the age of twenty-one years, or if she has none (a¹), I give all the said last-mentioned premises unto the trustees, &c. during the respective lives of my said son *John Dolley* and daughters *Sarah Ward* and *Ann Dolley*, upon trust to pay or permit my said son and two last named daughters to receive and take the rents, profits, and annual income thereof for and during their respective natural lives in equal shares, the shares of my said two daughters to be for their separate uses only and independent of any husband or husbands; and upon the decease of my said son and two last named daughters, I give the share of each of them so dying unto his or her children, if a son or sons living to attain the age of twenty-three years, and if a daughter or daughters

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(a¹) There were similar devises to the testator's other children. In that to *Ann*, the words in this part of the will, as to the absence of issue, were, "or in case my said daughter *Ann* shall die without issue." In the other devises neither of these forms of expression was used. In other respects, the devises were in all material points identical.

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Mr. *Malins* and Mr. *Greene* (Mr. *Bailey* and Mr. *George Atkinson* were with them) for the Plaintiffs in Error :

Ann had an estate for life; and in the event which has happened, of her dying without ever having had a child, the gift over must be treated as a contingent remainder which took effect on the determination of the particular estate, and consequently was not void for remoteness: *Cole v. Sewell* (*d*). The limitation to her children was a contingent remainder in fee, which might have vested, but did not: then the testator says, that if she shall die without issue other persons are to take the property as tenants in common for life, and their children after them. This is an alternative contingent remainder, a remainder with a double aspect, according to the rule laid down in *Luddington v. Kime* (*e*), and acted on in *Goodtitle v. Billington* (*f*), *Crump v. Norwood* (*g*), and *Goring v. Howard* (*g*¹), and consequently the doctrine of remoteness does not apply here. For, the moment it is ascertained that the Court has to deal with a contingent remainder, then comes in the rule that every remainder must be supported by an estate for life, or in tail, and must take effect during the continuance or at the expiration of that estate: *Cole v. Sewell* (*h*). That was so here; and at the death of *Ann*, the particular estate determined, and the gift over took effect as a remainder. The case of *Festing v. Allen* (*i*) does not impeach this doctrine, for there, though the children of Mrs. *Festing* could not take, because they had not attained twenty-one when the particular estate failed, yet their very existence prevented the

(*d*) 2 H. L. Cas. 186.

(*e*) 1 Lord Raym. 203.

(*f*) Doug. 753.

(*g*) 7 Taunt. 362.

(*g*¹) 16 Sim. 395.

(*h*) 4 Dru. & War. 1; 2 H. L. Cas. 186.

(*i*) 12 Mee. & Wels. 279. See also 5 Hare, 573.

effect of the second contingency, and the estate could not go over. No such difficulty arises here, for *Ann* had no children, and here there is a particular estate, that of *Ann* herself, which sustains the gift over to her brother and sister's children till the happening of her own death. This case is clearly distinguishable from *Leake v. Robinson* (*j*), for there the gift, part good and part bad, was made to a class, and the two parties of that class could not be separated from each other. Here each gift is an alternative contingent remainder, and being so, *Ann* could have destroyed the remainder by a fine: *Doe d. Herbert v. Selby* (*k*); but not having done so, that case shows that her particular estate which would support the first remainder as a contingent remainder will also (the first contingency never having happened) support the other, which is an alternative contingent remainder. If *Ann* had had sons living at her death, it might have been contended that this alternative devise over was an executory devise, and was void for remoteness, depending, as it would then have done, on her sons not living to twenty-three; but as she had no children, it took effect immediately on her death, as a contingent remainder.

The Court of Exchequer Chamber was wrong in treating the two devises as bad, because one of them might, under certain circumstances, have been illegal as too remote. If, on account of the events that happened, one of them could have full effect given to it, the Court ought to have given it effect: *Monypenny v. Dering* (*l*), *Longhead d. Hopkins v. Phelps* (*m*).

It cannot be contended, that because the words creating the limitation over in the case of *Ann* appear to refer only

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(*j*) 2 Mer. 363.

& Gord. 145.

(*k*) 2 Barn. & Cr. 926.

(*m*) 2 Sir W. Bl. 704.

(*l*) 7 Hare, 568; 2 De G. M.

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to the death of children they are not to be applied to the case of no children coming into existence. The meaning of the testator was the same in the case of *Ann* as in that of *Elizabeth Maria*; it was that the estate should go over if *Ann* died without children, whether that arose from her never having any, or from their dying before her; and the mistake in the Exchequer Chamber was, that while admitting the devise over in the case of one estate to be, on that account, a contingent remainder, the Court applied in the case of the other estate the doctrine peculiar to an executory devise, and did so because of the absence of any expression as to dying without having any children, and because one event being too remote, the two parts of the devise could not be separated from each other. Yet, in *Jones v. Westcomb* (n), and *Gulliver v. Wickett* (o), both cases on the same will, the first relating to personal, the other to real estate, the devise over being exactly like the present, it was held to take effect on the death of the wife, who never had any child at all. In *Avelyn v. Ward* (p), that principle was applied to a case of a different kind. There the devise was on condition that the land should go over to another if the devisee did not give a release in three months after the testator's death. The devisee died in the testator's lifetime, and it was held that the devise over took effect. *Meadows v. Parry* (q), and *Murray v. Jones* (r), established the same rule, which was also acted on in *Mackinnon v. Sewell* (s), and in *Wilson v. Mount* (t). The principle always has been, that it was the bounden duty of the Court, if it could properly be done, to support a devise as a contingent remain-

(n) 1 Eq. Cas. Abr. 245.

(o) 1 Wils. 105.

(p) 1 Ves. 420.

(q) 1 Ves. & Bea. 124.

(r) 2 Ves. & Bea. 313.

(s) 2 Myl. & K. 202.

(t) 2 Beav. 397.

der, and not as an executory devise, *Cawardine v. Cawardine* (u). In *Doe d. Harris v. Howell* (v), therefore, an executory devise was, by the course of events, held to have been converted into a contingent remainder. The principle there acted on must be applied here, so that even if the devise over in this case had originally borne the character of an executory devise, and might have been so treated had the controversy arisen before *Ann's* death, it has now, by the events which have happened, assumed that of a contingent remainder.

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Mr. Rolt and Mr. George Simpson, for the Defendant in Error :

The limitation over is an executory devise ; but even if it can now be treated as a contingent remainder, which is denied, it cannot take effect, for it is made to depend on an event which is too remote. It cannot be so treated, for it was void in its creation, and subsequent events cannot make it valid.

The questions here relate to the interests of *John's* children, in the share of *Ann*, in the property devised to *Elizabeth Maria*, and also in the share of *Elizabeth Maria*, in the property devised to *Ann*. The limitations in both are the same ; in neither is there any life estate to *John*. This is a gift over after a vested remainder in fee, *Bromfield v. Crowder* (w). It was declared to be so in *Doe d. Dolley v. Ward* (x), and that construction was adopted in this very case (y) ; it will, therefore, operate as an executory devise, *Fearne* (z). In support of that doctrine many cases are quoted, and one of them is, that of *Doe d.*

(u) 1 Eden, 27.

(v) 10 Barn. & Cr. 191.

(w) 1 New Rep. 312.

(x) 9 Ad. & Ell. 582.

(y) 18 Q. B. Rep. 224.

(z) C. R. and E. D. 9 Ed. 306.

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Herbert v. Selby (a). That case shows, particularly in the judgment of Mr. Justice *Bayley*, that where there was a determinable fee vested as a remainder in the child of the tenant for life, a devise coming after it, and to take effect on that failing could only be treated as an executory devise. The circumstance that the first remainder never in fact vested because there was no child of *Elizabeth* or *Ann* does not affect the question, and certainly the Plaintiff in Error does not rely on but (in his fourth reason) (b) repudiates that circumstance as an ingredient in his case; but, in truth, the estate would have vested in their children at birth, and then the devise following the estate so vested could only be an executory devise. No suspense of this vesting was intended. In *Festing v. Allen* (c), the gift over failed, because the children of the tenant for life had a contingent remainder dependent on their attaining twenty-one, and, as their mother died before they attained that age, they did not answer the whole of the description, so that the remainder to them was consequently defeated, and all the other remainders were defeated by the same event. In *Bull v. Pritchard* (d), there was a devise to a daughter for life, and after her death to such of her children as should attain twenty-three, and if there should be no such child or children, or all should die under twenty-three, over; there the limitation over was held void for remoteness, although there was a provision for the maintenance of the daughters' children till their attaining twenty-three; and

(a) 2 Barn. & Cres. 926.

(b) "Because the judgment of the Court of Exchequer Chamber appears to assume that on the birth of any child who was to take under the limitations contained in the respective devises to *Ann* and *Elizabeth*, the estate limited to such child would have vested on its birth, which was not the case, the words being materially different from those in the clause in *Doe d. Dolley v. Ward*."

(c) 12 Mee. & Wels. 279.

(d) 5 Hare, 567 ; 1 Russ. 213.

this was so because, according to the rule laid down in *Duffield v. Duffield* (e), the estate could not vest until the child attained the age mentioned in the will. To escape from this consequence, it is contended by the other side, that the will must be read as operating by the events that have since happened. That is not so. It must be read with relation to the time of the testator's death. The heir at law is not bound to wait for events which may convert an executory devise into a remainder, or make a void limitation a valid one. He may question the devise at once.

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The testator has only spoken here of one event; the devise cannot be treated as including two: *Jee v. Audley* (f). Where he has only mentioned the dying without children to attain twenty-three, the dying without any children at all cannot be added. That would be to make a new will for him, and that is exactly what was refused to be done in *Leake v. Robinson* (g). The limitation expressed is void at its creation; it cannot be made good by implying something not expressed. The cases relied on by the other side are those where the limitations were all valid in themselves, as in *Jones v. Westcomb* (h), and *Gulliver v. Wickett* (i), or where there were two limitations, one legal, the other illegal, and the illegal limitation was disregarded, the only instance of which is *Longhead d. Hopkins v. Phelps* (j); or where one event is described which is illegal, and another is described which, on that account, is good for nothing, but may become good by the lapse of time, of which the present is an instance; and as to which it is submitted, that the principle in *Leake v. Robinson* (k), which entirely governs this case, is fatal. That principle

(e) 1 Dow. & Cl. 268.

(f) 1 Cox C. C. 324.

(g) 2 Mer. 363.

(h) 1 Eq. Cas. Abr. 245

(i) 1 Wils. 105.

(j) 2 Sir W. Bl. 704.

(k) 2 Mer. 363.

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is there expressed by Sir *W. Grant* in these words: "To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what we have to determine is, whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, that is, a series of particular legacies to particular individuals, or, what he had as little in his contemplation, distinct bequests in each instance to two different classes, that is, to children living at his death, and to children born after his death." Here the devise is to a class, and these observations exactly apply. They are in accordance with the principle acted on in *Proctor v. The Bishop of Bath and Wells* (l); and the cases of *Jee v. Audley* (m), and *Dungannon v. Smith* (n), not only sustain the principle of that decision as to the construction of the will, but show that, in order for a devise to be good, it must be good at the time of the testator's death. It is not sufficient that such a devise may possibly become valid, it must necessarily be valid at the time. This latter doctrine was expressly applied in the case of *Lord Southampton v. Lord Hertford* (o). There it was held that a trust, being void in its creation, was incapable of modification, so as to establish it to the extent to which it might have been originally carried; *Ware v. Polhill* (p), and

(l) 2 H. Bl. 358.

(m) 1 Cox C. C. 324.

(n) 12 Clark & Fin. 546.

(o) 2 Ves. & Bea. 54. See

also *Merlin v. Blagrove*, 25 Bea. 125.

(p) 11 Ves. 257.

Marshall v. Holloway (q) are to the same effect. In *Ibbetson v. Ibbetson* (r) there was a bequest of chattels in trust, to be used by the person in possession of the mansion-house until "a tenant in tail of the age of twenty-one years shall be in possession" of it. When the testator died, his brother succeeded to the possession of the mansion-house, as tenant for life, with remainder to his son; that son was then eleven years of age, and became 21 long before the death of the tenant for life, so that, on his death, the condition of the gift became capable of instant fulfilment, yet it was held that the gift being in its creation, namely, at the death of the testator, too remote, the events that had happened afterwards did not make it valid. The case of *Moneypenny v. Dering* (s), which is relied on by the other side, afterwards went before the Lord Chancellor *St. Leonards* (t), and though the decision below was affirmed on the particular words of that will, yet his Lordship, after examining the case (u), said, "that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over, which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid;" and his Lordship adopted the words used in *Proctor v. The Bishop of Bath and Wells* (v), "There is no instance in which a limitation, after a prior devise, which was void from the contingency being too remote, had been let in to take effect." And he added, "The Court will not hold a gift over, made in words comprising only one event as made on two events, although, in point of fact, it may consist very reasonably of two branches, unless the

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(q) 2 Swanst. 432.

(r) 10 Sim. 495, affd. 5 Myl.
& Cr. 26.

(s) 7 Hare, 568.

(t) 2 De G. M. & Gord. 146.

(u) Id. 182, et seq.

(v) 2 H. Bl. 358. 362.

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testator himself has so expressed it." In the same judgment (*w*) Lord *St. Leonards* showed that a gift like the present would be void, for "the limitation over was never intended by the testator to take effect, unless the person whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event where the person to take was actually in existence, but could not take;" and this he said had been the decision of the Court of King's Bench in *Beard v. Westcott*, which was affirmed by Lord *Eldon* (*x*).

Mr. *Malins* replied.

The *Lord Chancellor* moved that the following question be put to the Judges:—

Neither of the testator's daughters, *Elizabeth Maria* and *Ann*, ever having had any issue, and *Ann*, the survivor, having died in 1847, does the will contain any valid devise on her death to the children of *John* and *Sarah* of the property originally given to *Elizabeth Maria* and *Ann* respectively for their lives?

Mr. Justice *Wightman*:

June 11.
 Mr. Justice
 WIGHTMAN.

My Lords, for the purpose of considering the question proposed by your Lordships, it will not be necessary to state in detail the terms of the devises and limitations in the will, as they are stated shortly in the case of the Defendant in Error, and somewhat more at length, but very distinctly and correctly, in the judgment of the Court of Exchequer Chamber.

(*w*) 2 De G. M. & Gord, 182,
 183.

(*x*) Turn. & Russ. 25. See
 5 B. & Ald. 801.

The question in effect is, whether the Court of Queen's Bench was right in holding that the devise over to the children of *John* and *Sarah* took effect as a contingent remainder on the death of *Ann* without issue, or whether the Court of Exchequer Chamber was right in holding that the devise over to the children of *John* and *Sarah* was one indivisible executory devise which could not be split or separated into two parts.

Upon this point the decision of the Court of Exchequer Chamber seems to be mainly founded upon the judgment of Sir *William Grant* in the case of *Leake v. Robinson* (y). In that case the limitation over was to the whole of a class, of whom some were capable and others incapable; and it was held by Sir *William Grant* that such a limitation could not be divided and be good as an executory devise for such as were capable, and bad for those that were incapable. The class was indivisible, except by the testator himself, for if divided after his death it might be that the persons of the class who were by law incapable of taking in remainder were the very persons in favour of whom he included the whole class; and therefore, if the devise were split, the persons who would take might not be those whom it was the intention of the testator to benefit.

But the present case is upon this point clearly distinguishable; and the limitation over seems to be in its nature divisible, the having no child at all being one contingency, and the having a child which, if a son, does not reach the age of twenty-three, or if a female, twenty-one, being the other. In *Doe d. Herbert v. Selby* (z), it was held that an estate might be devised over in either of two events, and that in one event the devise may operate as a contingent remainder, and in the other as an executory devise

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(y) 2 Mer. 363.

(z) 2 Barn. & Cres. 926.

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and the Court of Queen's Bench in the judgment in the present case considers that it was governed by the case of *Doe v. Selby*.

It is admitted by the Court of Exchequer Chamber that by the words used by the testator in the limitation over, he intended to include two events, first, the event of *Ann* never having a child at all, and the compound event of her having a child, and that child dying within the prescribed age. The first event, if it stood alone, was legal. The second event was too remote to take effect according to law. The Court of Exchequer Chamber, however, was of opinion, that the testator included all these events, some legal, others illegal, in one class, and that the Court could not separate them; that the true meaning of the clause was, "in any event which can happen in which *Ann* dies leaving no child, who, if male, attains twenty-three years, or if female, twenty-one, I give the estate over."

The whole question, therefore, as before observed is, whether the clause for carrying the estate over is divisible or not. If it is, the Appellants ought to succeed, if not, the Respondents ought to succeed. The terms used in the limitation over include two contingencies; would there have been any real difference if the terms had been to *Ann* for life, with remainder to her children in fee, and if she have no child, or if she have a child who if a son shall not attain twenty-three years, or if a daughter who shall not attain twenty-one years, then over? In such case it can hardly be doubted but that the estate would be devised over in either of two events, and that in one event the devise over would be good as a remainder, though the second alternative would be objectionable as an executory devise on the ground of remoteness. The Court of Exchequer Chamber remarks that in the cases of *Jones v. Watcomb*, *Gulliver v. Wickett*, and the other cases cited upon

the argument, the limitations over, whether divisible or not, were in any event legal, and those cases, therefore, do not affect the question in this, which turns upon the divisibility of the contingencies ; and, commenting upon the case of *Murray v. Jones*, the Court observes, "That if Lady *Bath* had separately stated in her will the two contingencies in either of which Mrs. *Markham* was to take, each would have been legal, and her including them in one expression made no difference. It is like expressing the individuals of a class all of whom can legally take, which will be good ; but the reverse is the case if some of the individuals cannot legally take." That was the case in *Leake v. Robinson*, which is clearly distinguishable from the present, for the reasons already stated ; and it may indeed be cited as an authority to show that the limitation over in that case might have been good, if the terms used had been such as to separate such part of the class as could take from such as could not.

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No case or authority has been cited to show that where a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may not be divided though included in one expression ; and our opinion does not at all conflict with the authority of the cases of *Proctor v. The Bishop of Bath and Wells* (a), and *Jee v. Audley* (b), in neither of which cases was it possible for the limitation over to operate as a remainder.

We are therefore of opinion, for the reasons we have given, that the Court of Exchequer Chamber was wrong in holding that the contingencies in the limitation over could not be separated ; and as that was the ground of the decision, it is unnecessary to enter into the consideration of

(a) 2 H. Bl. 358.

(b) 1 Cox C. C. 324.

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various points which were made, and cases which were cited upon the argument before your Lordships, as we think that the devise was divisible, and that the judgment of the Court of Queen's Bench was right, and that the will contained a valid devise on the death of *Ann* to the children of *John* and *Sarah* of the property originally given to *Elizabeth Maria* and *Ann* respectively for their lives.

Lord *Cranworth*:

8th July.

My Lords, in this case I do not propose to trouble your Lordships by going over the facts, or stating the terms of the devise. The will has been so fully considered, that after the unanimous opinion which we have received from the learned Judges upon its construction, I think it is unnecessary for me to do more than to state to your Lordships that I concur in the opinion of the Judges, and very shortly to state the grounds of that concurrence.

I think that the gift to the children of *John* and *Sarah* on the death of *Ann* without issue in 1847 took effect as a contingent remainder and not as an executory devise, and so was good; because when the particular estate determined, the contingency on which the remainder was to take effect had happened.

On the death of *Ann*, the testator gives what she had enjoyed for her life to her children, that is, sons at the age of twenty-three and daughters at twenty-one. This devise, according to the decision of the Court of Queen's Bench in *Doe d. Dolby v. Ward (c)* would if *Ann* had left any children, have given them a vested estate in fee simple with a subsequent executory devise, or attempted executory devise to the children of *John* and *Sarah* in the event of the sons dying under twenty-three. This would have been bad for

remoteness. But in the event which happened the gift to the children of *Ann* never took effect, so that the question as to the remoteness of the gift over on the death of those children under twenty-three never arose. On the death of *Ann*, the contingency on which one-sixth of the shares of *Elizabeth* and *Ann* was given to the children of *John* had happened, for *Ann* had then died without any child who could attain the age of twenty-three years ; and there is no rule which could prevent the estate from then vesting in those to whom it was given on a contingency which happened at the instant when the particular estate determined.

The case is not distinguishable in principle from *Gulliver v. Wickett* (d). There, it is true, the devise over, if there had been a child, was on an event not too remote, and which, therefore, might have taken effect. In that respect it differs from the present case ; but the Court held that the devise in the event which did happen, of there being no child, took effect, not as an executory devise but as a contingent remainder. I state that, although I know that a very high authority, Mr. *Fearne* (e), says the contrary ; but looking at the case, I can come to no other conclusion. The note of the Reporter, at page 106, appears to me to show that he did not fully appreciate the force of Chief Justice *Lee's* language, which seems to have been studiously framed with the view of showing that in one event, that which did not happen, namely, the event of there having been a child, the gift over must have taken effect (if at all) as an executory devise, but in the event which did happen, namely, there being no child, the gift took effect as a remainder. The language is this ; after stating the case, he says, taking the proviso to be a limitation, and not a condition precedent, these cases amount to a full answer

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(d) 1 Wils. 105.

(e) C. R. and E. D. 9th Ed. p. 306.

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(the cases he had referred to), and therefore we are all of opinion, "That the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child, in contingency in fee, with a devise over, which we hold a good executory devise, as it is to commence within twenty-one years after a life in being, and if the contingency of a child never happened, then the last remainder to take effect upon the death of the wife; and the number of contingencies is not material, if they are all to happen within a life in being or a reasonable time afterwards."

Now, I am aware that Mr. *Fearne* treats the gift as an executory devise, and not as a remainder. But this is directly at variance with the language of the Court (which I have just read), and as I think with the well understood distinctions between executory devises and contingent remainders. If the language of the gift over had been that, "In case of the death of my said son, or either of my said two daughters without leaving a child who shall attain the age of twenty-three years or *without ever having had a child*, then I give the share of such son or daughter unto the children," &c. ; surely, on the happening of the latter alternative, namely, the death of one of the daughters without ever having had a child, the children taking under the gift over, would have taken a remainder. They would have taken an estate expressly given to them on the determination of the preceding life estate, given to them, it is true, on a contingency which, according to the hypothesis, would have happened at the instant when the particular estate came to an end. I can see no distinction, when we are only construing the language of the will, between the case where the contingency of dying without having had a child is, as I have suggested, expressed, and where it is implied, as it is in the present case. There is a contingent

remainder in fee to the child of the tenant for life if she had had one; if she had none then there is a gift to others in fee; the contingency must be determined at her death; and whether the result should be to give the estate to her own child, or to the children of her brother and sister, in either case the gift must take effect as a remainder, for no prior estate is divested or displaced.

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It is true that if the former alternative had happened; that is, if the daughter, tenant for life, had left a child, then there was a gift over on the death of that child, which was void for remoteness. That gift over could only take effect, if at all, as an executory devise; for it would be a gift over divesting the fee simple given to the child of the tenant for life. But I see no reason for holding that because in one alternative the gift must have operated as an executory devise, therefore it must do so in the other. In the case which has happened there is a gift to the children of the surviving son and daughter taking effect immediately on the termination of the preceding life estate, and which therefore is unobjectionable.

I therefore entirely concur in the unanimous opinion of the Judges, that the judgment of the Exchequer Chamber reversing that of the Queen's Bench was wrong.

Lord Wensleydale:

My Lords, I entirely agree with the learned Judges in the answer which they have given unanimously to the question which your Lordships proposed to them, and in the advice given by my noble and learned friend who has preceded me.

The facts of the case upon which the question arises are very succinctly and distinctly stated in the judgment of the Court of Exchequer Chamber delivered by the late lamented Baron *Alderson*, and no fault can be found with

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any part of it prior to that relating to the clause which the Judges in the Court of Exchequer Chamber held that they could not construe divisibly ; nor can any objection be made to the principles of construction which the Court laid down except as to that particular clause.

The Court held it to be clearly established that the testator gave an estate for life to his daughter *Elizabeth Maria*, with a contingent remainder in fee to her unborn children, which became vested on the birth of a child, and that upon such child or children being born, but failing, if a male, to attain twenty-three, and, if a female, twenty-one, then he gave *Elizabeth Maria's* share by executory devise to his three other children equally. That executory devise was too remote. But he also provided by a distinct clause that if *Elizabeth Maria* had no child the property should go over in like manner to his three other children ; and that event having happened, the devise over took effect, not as an executory devise, but as a good contingent remainder to his three other children, one of whom was *Ann*. She died, never having had a child, and the contingent remainder in fee to her children failed. And the question arises on the terms of the devise over, in which the Court observes there are not the two events which are separately and distinctly mentioned in the former devise. The devise over, if she shall have no children, is not mentioned in terms at all.

The Court admitted that the testator intended to include in the words of the clause the double events, first of *Ann* having no child at all (for, certainly, if she never had a child, she must die without leaving a son or daughter who should attain the required age), and, secondly, the compound event of her having a child, and that child dying under the prescribed age. But the Court did not feel itself at liberty, in the case of an executory devise, so to construe

the clause, but acted on the principle that a devise to a class, Sir *William Grant* held in the case of *Leake v. Robinson*, could not be split.

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In concurrence with the opinion we have received from the learned Judges, I think this is a mistake. The gift to a class is a gift to a body of persons, uncertain in number at the time of the gift, but to be ascertained at a future time, and who are all to take equally, the share of each depending, as to amount, upon the ultimate number of persons (see *Jarman on Wills*) (f), and that ultimate number incapable of being ascertained within legal limits. Such a devise as this, Sir *William Grant* held he could not split into portions, for that would be to make a new will. But that doctrine is entirely inapplicable to this case. There is nothing to prevent the construing of the clause in the first instance, and ascertaining its proper meaning, though it be an executory devise, and having ascertained its meaning, to apply the rules of law to it. So doing in this case, there cannot be a doubt that the meaning of the clause is what the Court of Queen's Bench suggests it to be, and its legal effect is precisely the same as if the testator had provided, in express words, for the event of *Ann* having no children, as he had done in the former clause as to *Elizabeth* having none. So reading this clause, there is no doubt that in the event which happened of *Ann* having no children, the gift over took effect by way of contingent remainder.

Lord *Chelmsford* :

My Lords, the question in this case is, whether the devise over in case of the testator's daughter *Ann* dying without issue, or in case of all the children which she

(f) Vol. i. p 287-295.

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might have dying, if a son, under the age of twenty-three years, or if a daughter, under the age of twenty-one years, will embrace the case, which is not expressly mentioned, of the daughter *Ann* never having a child at all; and if so, whether the devise over is good in that event, or whether it must not all be taken together, and the part with respect to the sons dying under the age of twenty-three being too remote an event to take effect according to law, the whole devise must not be held to be void.

Both the Court of Queen's Bench and the Court of Exchequer Chamber consider that the devise in question included the case of the daughter *Ann* having no child; Mr. Baron *Alderson*, who delivered the opinion of the Court of Error, saying "It may be well admitted that the testator intended to include in the words two events; first, the event of *Ann* having no child at, all for, certainly, if she never had a child, she must die without leaving a son who could attain twenty-three, or a daughter who could attain twenty-one; but secondly, he also intended to include in the same words the compound event of her having a child, and that child dying under the prescribed age." But the Court of Queen's Bench held that the limitation might operate as a contingent remainder, in the event of *Ann* having no child, which would of course take effect, if at all, upon the determination of her life estate, although, if she had died leaving children, the limitation would have been void, as it would then only take effect as an executory devise, and would be bad as being too remote. The Judges in the Court of Exchequer Chamber, on the contrary, held that, although the limitation included the event of *Ann's* having no child, which would of course, if it had stood alone, be a perfectly valid bequest, to take effect on *Ann's* death, yet that being entire and indivisible, and part of it depending upon an

event too remote to take effect according to law, it was altogether void. The ground upon which they proceeded was, that a devise upon different contingencies can only be split into its parts, and effect given to one part of it, where all the contingencies contemplated by the testator are legal, and for this reason they distinguished the case of *Jones v. Westcomb* upon which the Court of Queen's Bench proceeded, and the case of *Gulliver v. Wickett*, which was upon the same will, from the present case. But it appears to me that the distinction is not to be supported either upon principle or by authority. It is conceded by the Court of Error that the limitation in question involves a contingency with a double aspect, depending upon events which are distinct and separate from each other. The alternative contingencies must therefore be taken as if they had been separately and distinctly expressed. Why then should the words of contingency, on which the void estate was intended to be limited, affect the valid estate to which they do not apply? And can there be any difference in principle between cases where the alternative limitations, though distinct and separate in their nature, are both involved in words which apply equally to and include within them both the limitations, and those where each of the limitations, is separately expressed by its appropriate description? If this is so, the opinion of the Court of Exchequer Chamber is opposed to the authority of the cases of *Leake v. Robinson* (g), *Goring v. Howard* (h), and other cases which relate to personal property, and *Monypenny v. Dering* (i), which is a case of real property. The case of *Proctor v. The Bishop of Bath and Wells* (j) was pressed upon your Lordships as a conclusive

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(g) 2 Mer. 363.
(h) 16 Sim. 395.

(i) 2 De G. M. & Gor. 145.
(j) 2 H. Bl. 358.

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authority in favour of the Defendant; but it appears to me to afford him no assistance. In that case there was no possibility of the limitation ever taking effect independently of the first devise. It was limited upon the event of *Thomas Proctor* having no son capable of entering into holy orders. This must necessarily have been contingent during the life of *Thomas Proctor*, the devise over was wholly dependent upon it, and as the Court said, "The words of the will could not admit of the contingency being divided." If the devise over had been in case *Thomas Proctor* should have no such son at the death of the testator, it would have been more like the present case, and would have exactly resembled *Moneypenny v. Dering*, and there would have been no doubt, notwithstanding the invalidity of the devise to the son of *Thomas Proctor*, that the alternative limitation would have been good.

I therefore concur in the opinion which has been expressed by my noble and learned friends, that the judgment of the Court of Queen's Bench was correct, and that the judgment of the Court of Exchequer Chamber reversing that judgment was erroneous, and ought to be reversed.

Lord Brougham:

My Lords, I entirely agree with all my three noble and learned friends who have addressed your Lordships, and with the learned Judges who, after full consideration, have given a clear and unanimous opinion upon the subject. As to the cases, of which there are several, I need not go into them. One of them is *Proctor v. The Bishop of Bath and Wells*. In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise. There were also several other cases which I need not go into, as my noble and learned friends have referred

to them. I therefore move your Lordships to pronounce judgment for the Plaintiff in Error, reversing the judgment of the Court of Exchequer Chamber, and setting up the judgment of the Court of Queen's Bench.

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Judgment of the Court of Exchequer Chamber reversed and judgment given for the Plaintiff in Error.

The Right Hon. Baron KENSINGTON - *Appellant.*

The Rev. EDWARD BOUVERIE and others - *Respondents.*

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WHERE a tenant for life of an estate subject to a charge bearing interest, pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remainder-man any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances, there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption. (*Diss. Lords Cranworth and Wensleydale*, who held that there is no such presumption, especially when the payment is made under force of a personal obligation to pay).

Tenant for Life.
Charge on Estate.
Insufficiency of Rents.
Interest.
Incumbrance.
Practice.

If the tenant for life is himself the person entitled to the benefit of the charge, and has mortgaged it, and his mortgagees have regularly been paid the interest on the mortgage debt, they are in no better situation than the personal representatives.

Where the will of the tenant for life disposes of the charge "and interest," those words cannot be taken to refer to anything but the interest which will accrue after his death, till the charge itself is redeemed.

IN *April* 1832, a large property at *Kensington*, which for convenience sake will be described as the *Kensington* estate, was mortgaged to Lord *Braybrooke* and others, to secure a sum of 60,000 *l.* and interest, on trusts specially mentioned. The mortgage contained a covenant on the part of the then

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Lord *Kensington* for payment of that sum and interest. On the same day, as a farther security, a similar mortgage of another estate at *Lambister* in *Wales* was executed by his Lordship.

On the 9th and 10th *October* 1833, the present Lord (the Appellant) having come of age, and being about to be married, deeds of lease, release, and settlement were executed between the late Lord *Kensington* of the first part, the Appellant of the second part, and trustees of the third part, by which the late Lord, in consideration of the intended marriage of his son, conveyed the *Kensington* estate, subject to this mortgage for 60,000 *l.* and interest, to the use of himself for life, remainder to the Appellant for life, remainder to the first and other sons of the Appellant in tail male, remainder to his own right heirs. And power was reserved to the late Lord to charge the estate with a sum of 20,000 *l.* and interest, for the use of himself, his executors, &c., to be appropriated to such purposes as, by will, or otherwise, he should appoint, and to create a term to raise the sum so charged. And the aforesaid sum of 60,000 *l.* was made a primary charge on the *Kensington* estate. The rental of the *Kensington* estate appeared, by the schedules, to amount to 2,914 *l.* a year. By an indenture, dated 4th *February* 1835, the late Lord exercised the power thus reserved to him, and charged the estate with the sum of 20,000 *l.* and interest; and, for the purpose of this charge, he created a term of 1,500 years in *Henry Whittaker*, his executors, &c., subject to the mortgage for the 60,000 *l.*, upon trust to raise the sum of 20,000 *l.* by mortgage, with a proviso for the cessor of the term on payment of the principal upon the 4th *August* following.

The late Lord assigned to Lord *Braybrooke* and others the charge of 20,000 *l.* and the term, for the purpose of securing the repayment of different sums borrowed at various

mes, and amounting in the whole to 14,277 *l.* 6 *s.* 2 *d.* On the 27th *January* 1842 the late Lord *Kensington*, who was indebted in considerable sums to the Respondents, *Edward Bouverie*, the Bishop of *Bath* and *Wells*, and *Philipp Pleydell Bouverie*, executed to them (together with securities on other property) a mortgage of this charge of 20,000 *l.* and interest, subject to the principal sum of 4,277 *l.* 6 *s.* 2 *d.* and interest, and also of the *Kensington* estate subject to the 60,000 *l.* and interest, and to the estates created by the settlement of *October* 1833, and to the charge of 20,000 *l.* and interest, subject to redemption by himself, his heirs, &c. of 24,500 *l.* The indenture contained a covenant by the late Lord to pay the principal and interest of the sum of 24,500 *l.* on the 1st *March* then next ensuing, "and in case the said principal sum of 24,500 *l.*, or any part thereof, shall not be paid on the 1st *March* now next, shall and will thenceforth pay interest for the said principal sum or the unpaid part thereof after the rate of 5 *l.* per cent. per annum from thenceforth, in equal portions, on the 1st *March* and the 1st *September* in every year until the full payment of the said principal." The indenture then contained a proviso that "until default shall be made in payment of the said principal or the interest, &c., it shall and may be lawful to and for the said Lord *Kensington*, his heirs, &c. peaceably and quietly to have, hold, and enjoy the said premises hereby charged as aforesaid, &c., and to take the rents, issues, and profits thereof, and the interest of the said sum of 20,000 *l.*, expressed and intended to be hereby assigned as aforesaid to and for his and their own use, without let or disturbance," &c. from the *Bouveries*.

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Lord *Kensington* continued in possession of the premises until the time of his death. By his will, dated 24th *May* 1852, he gave to his executors, in addition to other things,

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“all that the said sum of 20,000 *l.* and interest so raised and charged by me as aforesaid.” Interest on the sums of 60,000 *l.* and 20,000 *l.* was duly paid, but the rents and profits of the *Kensington* estate not being sufficient, after satisfying the interest on the 60,000*l.*, to satisfy the interest on the charge of 20,000 *l.*, it was paid out of other monies of the late Lord *Kensington*. He died on the 10th *August* 1852, and his son, the Appellant, entered into possession of the estates. The Appellant claimed to exercise as to the *Bouveries* the equity of redemption on this estate. Lord *Braybrooke* and the other trustees of the 60,000*l.* and the 14,277 *l.* 6 *s.* 2 *d.* were content to let those sums which were the first charges on the *Kensington* estate remain upon their present securities. If the Appellant was entitled to the order he sought, he could redeem from the second mortgagees on payment of 5,722 *l.* 13 *s.* 10 *d.* and interest, that being the balance of the charge after satisfying the first mortgage. The Respondents, the *Bouveries*, who held the second mortgage, contended that the late Lord had created a charge of 20,000 *l.* on this estate; that he had assigned that charge to them; that they were entitled to all his interest therein; and as the rents had not been sufficient to keep down the interest of that charge, they contended that what the late Lord had paid to supply the deficiency made him an incumbrancer on the estate to that extent, and gave them, as his mortgagees, the rights to which he was entitled. The object of this claim was to exonerate *pro tanto* other property of the late Lord mortgaged to the *Bouveries*.

When the case came before the *Master of the Rolls* (a), his Honor, by a decree, dated 1 *March* 1854, declared the Appellant entitled to redeem the *Kensington* estate, upon

(a) 19 Beav. 39.

payment of what should appear to be due in respect of the said sum of 20,000*l.* and interest thereon, charged by the indenture of the 4th *February* 1835, and an account was directed of what was due, and of the rents and profits received by the Respondents, or which, without their wilful default, might have been received by them since the death of the late Lord, and an inquiry to whom the principal and interest on taking the accounts should appear to be due in respect of the said charge, and in what proportions, &c.

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The chief clerk made his certificate on the 17th *February* 1855, by which he certified that the principal sum was due with 1,029*l.* 8*s.* 1*d.* for interest, calculated from 10 *August* 1852, the day of the death of the late Lord, to the date of the certificate, and 72*l.* 6*s.* 7*d.* for costs; that there was nothing due from the Respondents for rents received since that day, and that the sum of 21,101*l.* 14*s.* 8*d.* so due, was due in the following proportions: to Lord *Braybrooke* and others (the first mortgagees) 14,428*l.* 7*s.* 6*d.*, and to the *Bouveries* (the second mortgagees) 6,673*l.* 7*s.* 2*d.* on account of the principal sum of 24,500*l.* secured to them upon the said charge, and interest.

On the 9th *March* 1855 a motion was made to the *Master of the Rolls* to vary the certificate, and that the interest might be calculated from the 4th *February* 1835, instead of the 10th *August* 1852, but his Honor declined to make any order on this motion.

The case was then taken by appeal to the Lords Justices, who directed the certificate to be varied as asked by the motion. And it was declared that as between the late Lord and those claiming in remainder, he was bound to keep down the interest on the 20,000*l.* during his life (after the interest on the 60,000*l.* charged on the fee) only so far as the net receipts and profits received by him would

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extend, and that the surplus was a charge on the fee, and an account was directed on this principle (b).

This was the order now appealed against.

The *Attorney General* (Sir R. Bethell) and Mr. Eddis, for the Appellant :

Supposing the late Lord to have had power to charge the estate with interest on the sum of 20,000 £. till it was raised and paid, and supposing him duly to have exercised that power, then the question arises whether, under the circumstances of this case, he was entitled during his life, as creator of the charge, to receive the interest thereon; and whether he was not bound, as tenant for life, to keep down that interest, and as mortgagor to pay the interest on the mortgage. That interest was payable out of the rents and profits which, being allowed to remain in possession, he took for his own use. He did keep down the interest of the mortgage, yet the mortgagees now claim, in addition to the charge itself, to have the whole 20,000 £. and also interest upon it, as if interest had not been received or paid during his life. And the Lords Justices have, by admitting that claim, made him his own creditor, and incumbrancer on the fee-simple of the estate, for the sum of money which is the difference between the rents and profits and the interest on the charge. This cannot be done. There are two rules which must be borne in mind :

(b) 7 De. G. M. & Gord. 134. On that occasion Lord Justice *Turner* said (p. 151), The case depends upon three points, first, whether the late Lord had power as between himself and the parties in remainder to charge the estate with interest upon the 20,000 £. to accrue during his life ; secondly, whether he had so charged it ; and thirdly, whether if he had in fact so charged the estate, the charge was subsisting so far as the rents had been insufficient to answer the interest. In this House, after some argument on the first two points, the counsel were directed to confine themselves to the third.

first, that where there is a charge affecting the fee-simple of an estate, the tenant for life of that estate is bound to keep down the interest out of the rents and profits, but, unless it is his own debt, his liability is confined to paying the rents and profits, so far as they will go, in discharge of the interest. The next rule is, that if there is a mortgagee who allows the mortgagor tenant for life to continue in possession, he cannot, though the interest is in arrear, have an account against the mortgagor of past rents received. He may enter, or he may apply to the Court for a receiver ; but that is a proceeding against the tenant for life or mortgagor, not against the estate itself. The assignment of the mortgage by the tenant for life cannot make any difference, for the assignee of a chose in action has no better title than his assignor. Though the late Lord had power to charge the estate with 20,000 *l.* and interest, yet the words “ interest thereon ” in his will, must be considered as referable to the charge continuing to exist after his death, and do not warrant the inference of the Lords Justices that he had the power, by his will, to charge the fee with the interest which had accrued during his life. A tenant for life cannot change his character as such to that of incumbrancer, so as to relieve himself from these general obligations. The principle of equity is, that when a tenant for life pays off a charge on the inheritance, he becomes a creditor of the estate on which the money so paid off by him is charged, but he does not create any liability on the estate, while he is tenant for life of it, by merely paying the interest accruing on that charge. *Copis v. Middleton* (c) shows that in the case of a legal debtor and his surety, legal rights can only be preserved by legal liabilities being continued. Now here the interest was duly paid during

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(c) Turn. & Russ. 224.

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the life of the late Lord, and there can be no claim now against the estate itself, on the mere ground that the interest which was thus duly paid exceeded the rents and profits received from it. The late Lord, the tenant for life, never gave notice of any insufficiency in the rents and profits to meet the interest due, and not having done so, his representatives cannot now come on the remainderman to make good the deficiency.

[Lord *Brougham*: I see that the *Master of the Rolls* is reported to have said (*d*), “Nothing is better settled than that, if the remainder-man allows the tenant for life to receive the rents without keeping down the interest, he cannot, after the death of the tenant for life, ask for an account of the rents, and seek to establish a debt against his assets, on the ground that the rents were sufficient for this purpose.” How is that? How is the one to know, as of course, what the other is doing?]

[Mr. *Lloyd*, who appeared for the Respondent, said that this passage had excited attention in *Ireland* in a case of *Baldwin v. Baldwin*, which twice came before Lord Chancellor *Brady* (*e*). On the first occasion his Lordship described himself as “coerced” by this statement, but on the second occasion he said that he had communicated with the *Master of the Rolls* on the subject, when his Honor stated, “that some error must have occurred in the report, which he was not prepared to say was strictly in accordance with what he had said on the occasion.”]

It is clear that if the mortgagee, knowing that the rents are not sufficient, allows the mortgagor to continue in possession, he cannot afterwards, should the interest be allowed to fall into arrear, call for an account. The moment the

(*d*) 19 Beav. 54.

505; 6 Ir. Ch. Rep. (N.S.) 156.

(*e*) 4 Ir. Ch. Rep. (N. S.)

tenant for life dies, his obligation to keep down the interest ceases.

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[Lord *Brougham*: What sort of interest does the assignee of a mortgage take by the assignment? does he not take the property mortgaged with its incidents?]

Yes, but if *J. T.* is bound to keep down the interest of a charge on that property, and does so, his representative cannot without more say that *J. T.* did so partly out of his own funds, and that that itself constitutes a charge to which he is entitled on *J. T.*'s behalf.

[Lord *Chelmsford*: Suppose interest as well as principal to be expressly charged on the estate, is there any difference between paying off a portion of the interest, which is a charge, and paying off a portion of the principal, which is also a charge?]

Yes, because it is the duty of the tenant for life, even if he has an absolute power of appointment, to keep down the interest on a charge, though he has himself created it: *Whitbread v Smith* (*f*); but it is not his duty to pay off the principal.

[Lord *Cranworth*: Suppose the tenant for life received no rent, but took possession of the estate, would he not be an incumbrancer for the whole interest?]

He might redeem, and then he would become an incumbrancer for the amount of the charge, or he might call on the mortgagee to raise the principal and interest. He cannot take upon himself two opposite characters. The *Master of the Rolls* rightly showed the great difficulty of taking accounts where persons held these opposite characters, and stated that as the reason why no case was to be found in the books recognising such a right as that now set up by these mortgagees. On the other hand, the authorities as to the duty of the tenant for life to keep down the interest are clear and nu-

(*f*) 3 De G. M. & Gord, 741.

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merous. He must do so, though all the rents are exhausted by it: *Revel v. Watkinson* (g). In *Amesbury v. Brown* (h), a woman tenant in tail, with remainder to the heirs of the testator, of whom she was one, was in possession of the estate which was subject to a mortgage. Her husband paid off the mortgage, and the question was, whether he could be regarded as an incumbrancer in respect of the interest: it was held that he could not, for under such circumstances the mortgage debt was considered as subsisting in respect only of the principal, but not of the interest. *Jones v. Morgan* (i) explains the principle that applies to these cases. Lord *Thurlow* there said (j), "A tenant for life in general paying off a charge without taking an assignment, is a creditor for the sum so paid; but the smallest demonstration that he meant to pay it off will prevent his representative from coming for the money. Here he paid interest much beyond what the profits of the estate would have discharged, which is a demonstration *prima facie* that, though tenant for life, he meant to discharge the estate. Though he was only tenant for life, he knew it was settled on his family, and he put himself to extraordinary inconvenience to pay off this debt." The difference between him and a tenant in tail paying off a debt is, that the latter does not thereby become an incumbrancer for the debt itself, because he may, if he pleases, make himself absolute owner of the estate.

[The Lord *Chancellor*: To pay the interest would not be considered as paying a charge, though the interest is a charge.]—It would not. *Shershaw v. Gibbs* (k) shows that a mortgagee is not allowed to turn interest into principal. In *Penrhyn v. Hughes* (l) a mortgagee having permitted a tenant for life to run into arrear for interest, pur-

(g) 1 Ves. S. 93.

(h) Id. 477.

(i) 1 Bro. C. C. 206.

(j) 1 Bro. C. C. 218.

(k) 1 Kay, 333.

(l) 5 Ves. 99.

chased the estate for life, and took possession under the purchase, and Sir *Pepper Arden* held that he was bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the accounts, under a bill of foreclosure, it was directed accordingly. Here the late Lord's assets have actually been discharged from answering the obligations which are incident to an incumbrancer when he takes possession of the estate, and the liability cast on the succeeding tenant for life. If such a course can be adopted, an infant remainder man may be overwhelmed with charges accumulated during a long minority, of which charges no notice had been given.

Again: where, under such circumstances, direct equities are barred after a lapse of twenty years, this indirect equity cannot be enforced after the expiration of a much longer period of time. The term of years is confined to raising the sum of 20,000 *l.*; now, of that sum 5,723 *l.* were unraised. The late Lord was at that time indebted to the *Bouveries* in a sum of 17,600 *l.*; he wanted to borrow 6,900 *l.* more, and he gave the residue of this charge of 20,000 *l.*, with interest, as part of the security. That did not make them assignees of the whole charge, nor entitle them to receive the interest of the whole of the charge, deducting only the rent paid to Lord *Kensington*. By one provision in the mortgage deed, he is to retain possession of the estate, to take the rents and profits and the interest of the 20,000 *l.* as long as he pays the interest on the mortgage. That itself shows that he alone was responsible for the interest on the mortgage, and renders the effect of his personal covenant to pay that interest undoubted.

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Mr. *Lloyd* (Mr. *Shapter* was with him), for the mortgagees (*m*):

The charge was mortgaged. Interest on the charge, as such, was never paid to the mortgagees. There was no personal covenant by the late Lord to pay the interest on the 20,000 *l.* charge, though there was his covenant to pay the interest on the 24,500 *l.* borrowed money. The two things are wholly distinct. The deed recites that the sum of 20,000 *l.* has not been raised, but is still a subsisting charge, and that Lord *Kensington* was therefore still entitled in equity to that charge, and also to the *Kensington* estate, and then he mortgages the charge, and the interest thereon, as part security for 24,500 *l.*, and he covenants to pay the interest on that debt. The payment of interest on the mortgage was in discharge of his personal obligation only, and did not affect the interest due on the charge of 20,000 *l.* *Revel v. Watkinson* (*n*) is not an authority against but for the Respondents. The power to hold possession of the estates till default is a common provision. Now, the interest on the charge not having been paid, the Appellant is bound to pay it according to the rule, that a person coming in to redeem must pay all that is a charge on the estate at the time he proposes to redeem. In *Burrell v. Egremont* (*o*), it was held that if a tenant for life pays off a charge on the inheritance, he is *primâ facie* entitled to that charge for his own benefit; that he may, if he thinks fit, exonerate the estate; but, in the absence of evidence, the presumption is that he pays the charge for his own benefit, and

(*m*) The mortgagees and the personal representatives of the late Lord appeared by counsel: their interest in supporting the decree of the Lords Justices was however the same, and the senior counsel for each of these parties alone addressed the House.

(*n*) 1 Ves. S. 93.

(*o*) 7 Beav. 205.

not for the benefit of the persons in remainder ; and it was there said, that a tenant for life who pays off a charge is not bound to make a declaration that he does or does not intend to exonerate the estate ; the burden of proving that lies on those who assert that he did so intend. [Lord *Wensleydale* referred to *Burrowes v. Gore* (*p*)]. Though the tenant for life is bound to keep down the interest by the payment of what he receives as rents and profits, he is not bound to pay anything beyond that.

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[The *Lord Chancellor* : But if he does, without more, pay the interest as it becomes due, is he at any time afterwards to be permitted to rebut the presumption of the sufficiency of the rents and profits for such purpose ?]

There is no rule establishing a presumption of that sort ; but even if there was, any such presumption is here contradicted by the will, which in express terms gives to the executors “the said sum of 20,000 *l.* and interest so raised and charged by me as aforesaid.” Lord *Kensington* was under a personal covenant to pay the interest on the 24,500 *l.* ; his payment of that was a discharge of his personal covenant ; but it was no satisfaction of the interest on the 20,000 *l.*, which it is clear from his will he considered still to belong to himself. In *Jones v. Morgan* (*q*), which was quoted to show that there was a presumption of intention to exonerate the estate, Lord *Thurlow* required evidence of the intention of the tenant for life to pay off the debt, and said, “Is it not the rule, that if the tenant for life pays the debt, he becomes *primâ facie* entitled to be repaid, unless you show he meant otherwise ?” There is in truth no presumption of the kind supposed. In *Kirkham v. Smith* (*r*), a tenant in tail had paid off an incumbrance, but had taken no assignment, yet as the circum-

(*p*) 6 H. L. Cas. 907.

(*r*) 1 Ves. S. 258.

(*q*) 1 Bro. C. C. 206. 212.

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stances there did not show an intention to exonerate the estate, the remainder over was held liable to repay it to his representatives; and *Amesbury v. Brown* (s) recognised the same rule of decision.

[Lord *Chelmsford*: Conduct is evidence of intention. If a tenant for life knows that the rents are not sufficient, may not his paying the interest without doing anything else be considered as proof that he dealt with the property as if they were?]

It is matter of evidence, and not of presumption. The general rules as to a tenant for life were stated by Lord Chancellor *Sugden* in *Caulfield v. Macquire* (t). It was there held, that where an estate subject to a charge bearing interest is limited to several persons in succession as tenants for life, each of these persons is liable for the interest only for his own time; but that to liquidate the arrears during his own time, he must furnish all the rents if necessary during his whole life. *Clarendon v. Barham* (u) shows that the intention of the tenant for life is the subject of evidence, and that whatever was for his benefit must be presumed. *Whitbread v. Smith* (v) is not an authority the other way, for the sole question there was as to the terms in which an equity of redemption was reserved, and the tenant for life, who possessed an absolute power of appointment, not having exercised it, was held bound to keep down charges created by himself. But in *Sherwin v. Shakspear* (w), it was held that a vendor in accounting with his vendee for rents and profits is not, unless a special case be made, liable to account for sums which he might have received, but for his wilful default.

(s) 1 Ves. S. 477.

(t) 2 Jo. & Lat. 141.

(u) 1 Yo. & Co. C. C. 683.

(v) 3 De G. M. & Gord. 727.
741.

(w) 5 De G. M. & Gord. 517.

Mr. *Elmsley* (with whom was Mr. *Southgate*) for the personal representatives of the late Lord *Kensington* :

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It is for the Appellant to show in what way the estate is now discharged from any part of the charge created upon it. It is not discharged either by inference of law or by the conduct of the tenant for life. The true rule is to be found in the two cases of *Revel v. Watkinson* (x) and *Penrhyn v. Hughes* (y), and it is this, that unless there is conduct on the part of the tenant for life which amounts to a discharge of the settled estate, the unpaid interest will remain as a charge upon it. There is no such conduct here, and the unpaid interest remains as a charge. Suppose the late Lord had not mortgaged the charge, he would have been entitled to the interest on it; if the rents could not discharge that interest, he would have been a creditor for the deficiency. His personal representatives stand in the same position that he did. He had incurred debts, and assigned the charge to meet them; he has not received from the rents and profits sufficient to keep down the interest of that charge; he has made a will, and appointed executors, and given them duties to discharge; to enable them to discharge which duties, this interest on the 20,000*l.* must be paid. These facts show distinctly that he never did intend to exonerate the estate. Assuming therefore that the intention of the tenant for life is to be treated as explaining his conduct and affecting his rights, his intention to have the full benefit of this charge and the interest thereon is plainly shown.

The *Attorney General* replied.

(x) 1 Ves. S. 93.

(y) 5 Ves. 99. 106.

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25 July.The *Lord Chancellor* (Lord Campbell):

My Lords, after an anxious consideration of this case, I adhere to the opinion I had formed upon it at the conclusion of the argument, that the decree of the *Master of the Rolls* ought to be affirmed.

I do not proceed on the ground that if a tenant for life in possession of an estate subject to a charge bearing interest, pays the interest, although the rents and profits are insufficient to enable him so to do, he might not make himself an incumbrancer for the excess of his payments beyond the amount of his rents and profits. But it seems to me that if, remaining in possession, he receives the rents and profits, and regularly pays the interest upon the charge during his lifetime, having given no intimation that the rents and profits were not sufficient to enable him to do so, or that he means to consider any excess of his payments beyond the rents and profits a charge upon the inheritance, his legal personal representatives cannot be permitted to say that such a charge exists.

The controversy in this case is substantially between the present Lord *Kensington* and the legal representatives of his father. If the charge cannot be claimed by them, I think I can easily show that the mortgagees are in no better situation.

We may begin by considering how it would have been if the late Lord *Kensington* had created the charge, and, without mortgaging it, had continued in possession till his death, without any intimation that the rents and profits were not equal to the interest on the charge. Upon his death, could his representatives have claimed that he had a charge upon the estate for an alleged excess of the amount of the interest beyond the amount of the rents and profits? and upon a Bill filed by the remainder-man to redeem the charge, could they, for the purpose of showing

that there was some, and what deficiency, have insisted on an account of the rents and profits of the estate from the creation of the charge to the death of the tenant for life? I apprehend that, under such circumstances, they would have been told that there was a presumption that the rents and profits were equal to the interest on the charge, and that they could not be let in to rebut this presumption.

Lord *Kensington* having mortgaged the charge, I think his position became the same as it would have been if he had become tenant for life, the charge having been previously created in favour of third persons.

I rather wonder that any question has been made as to his power to create the charge for the 20,000 *l. and interest*, or, as to such charge having actually been created. I cannot doubt that the *corpus* of the estate was effectually charged with the 20,000 *l. and interest*, and that all we have to consider is the third question made by Lord Justice *Turner*, "Whether the estate being so charged, the charge is subsisting so far as the rents and profits have been insufficient to answer the interest?"

Now, whether a court of equity ought or ought not to hold that this charge is still subsisting, I think we must consider that in point of fact the interest upon the 20,000 *l.* was regularly paid by Lord *Kensington*.

Let us then consider the general question, "If the tenant for life of an estate, subject to a charge, he being bound, as far as the rents and profits furnish him with the means, to keep down the interest upon it, remains in possession, and during his life, regularly pays the interest without any intimation that the rents and profits are insufficient, or that he has any intention of charging the *corpus* of the estate with any deficiency, can his legal personal representatives be permitted to set up a claim for

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an alleged deficiency, and to demand an account of the rents and profits during the whole incumbency of the tenant for life?"

If the tenant for life had entirely paid off the charge, most undoubtedly, as far as the principal sum is concerned, he would have a charge on the *corpus* of the estate, because the annual rents and profits could not be considered as supplying a fund from which the principal could be paid. But, with regard to the interest, the annual rents and profits in the vast majority of cases do, and in all may be presumed to supply a fund from which the interest may be paid. With regard to the principal, it cannot be reasonably supposed that the tenant for life means to make such a present to the remainder man, and the claim of a charge to the amount of the principal may be made effectual without any account being taken; whereas, with respect to any deficiency in the means to pay the interest, the tenant for life may reasonably be supposed to waive any right he might have to make it a charge upon the estate, he being allowed to remain in undisturbed possession and in the comfortable expectation, that when he is dead and gone, no inquiry will take place into his management of the property, nor any attempt be made to charge his representatives with wilful neglect which might be imputed to him.

It is said that this is a question of intention, and that there should be some evidence of intention. But Lord *Thurlow* said, "The smallest demonstration is enough to show that the tenant for life means to take the debt upon himself." Surely this demonstration may be by acts as well as by words, and a continued system of a tenant for life, paying the interest upon a charge which he is bound to keep down as far as the rents and profits will permit, may amount to a declaration (which he

cannot afterwards gainsay) that the rents and profits are sufficient, or that he does not mean to bring any charge upon the inheritance for the deficiency.

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The most alarming inconveniences would arise from the doctrine, that in every case where a tenant for life of an estate under a charge, the interest of which he ought to keep down from the rents and profits, pays the interest regularly during his lifetime, he is to be considered as silently making himself an incumbrancer on the estate for any excess, large or small, of the payments for interest above the rents and profits.

In the first place, an account must be taken, extending over the whole incumbency of the tenant for life, which may be above seventy years; and the enquiry must be not only as to the rents and profits which he did actually receive, but as to such as by reasonably good management he might have received; the whole management of an estate, consisting perhaps of many thousands of acres, must be enquired into; and the result may be that there is a balance of 6 s. 8 d. in favour of the representatives of the tenant for life. The *Master of the Rolls*, perhaps, went too far in saying that such an account could hardly be taken, but he might have said truly, that the cost of taking it would generally greatly exceed the benefit to be expected from it.

Then see the injustice done to the remainder man. It being important to him to know whether the interest is kept down by the tenant for life, he may be supposed to enquire into the fact. If he finds that the interest has not been kept down, he may well suppose that the rents and profits have been misapplied by the tenant for life, and he may apply for the appointment of a receiver. Finding that the interest is regularly paid as it becomes due, he gives himself no farther thought; but upon the death of

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the tenant for life, he hears with surprise and dismay, that a charge upon the inheritance is claimed by the representatives of the tenant for life, and he is to be involved in a Chancery suit, which may last for years, to ascertain the amount of the incumbrance.

A farther hardship to the remainder man would be, that he would be deprived of the benefit of the Statute of Limitations passed in contemplation of the death of witnesses, and the destruction of written documents.

But a still more serious evil would arise from the uncertainty as to this new fashioned incumbrance created by a comparison between the amount of the interest paid and the amount of the rents and profits which might have been realised during the incumbency of the tenant for life. Upon a sale of the remainder, the abstract must not only show what incumbrances there are upon it, and that the interest upon the incumbrances has been kept down, but also that the rents and profits have been sufficient to keep down the interest, so that the representatives of the tenant for life will have no claim upon the inheritance for interest which he has paid beyond the amount of the rents and profits. But the charge is constantly shifting from year to year, and the actual amount of the burthen cannot be ascertained till the death of the tenant for life. But if the rule I have proposed be adopted, I am not aware of any inconvenience or any injustice which it can occasion.

In the absence of any authority that such a claim can be sustained, I must come to the conclusion that where there are no circumstances to counteract the effect of the interest being regularly paid by the tenant for life in possession, the claim is unsustainable.

Great reliance has been placed in the present case upon the fact, that the tenant for life was under a personal covenant with the mortgagees to pay them this interest

But how can the question between the representatives of the tenant for life and the remainder man be affected by a covenant between the tenant for life and the mortgagees? And if the interest has actually been paid without the reservation of any claim against the *corpus* of the estate, why should the covenant prevent the estate from having the benefit of the payment? The tenant for life voluntarily entered into that covenant after the charge had been created.

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Reliance is next placed upon a supposed expression of intention by Lord *Kensington* to make the interest he had paid a charge upon the inheritance, because by his will he disposes of the 20,000 *l.* “*and interest.*” But supposing that any intention expressed by him in a document not meant to be read, nor to operate till after his death, could be availing for this purpose, the words of this bequest are fully satisfied by the interest that would become due on the 20,000 *l.* after the remainder man has entered, and before the charge is redeemed.

It was likewise argued, that Lord *Kensington's* manifested desire to increase his personal estate, ought to lead to the conclusion that he paid the interest for the benefit of his younger children, not of his eldest son. But if we are to guess at his intentions on this point when he executed the settlement containing the power of charging, my belief is, that he never contemplated that, under the power, the estate should be charged with more than 20,000 *l.* during his own life, he remaining in possession and paying the interest, and with interest after his death till the charge should be redeemed. If he had been asked what his intention was in covenanting with the mortgagees to pay the interest, and paying it from funds other than the rents and profits, he would probably have said, “I mean, that at my death, I may have the 20,000 *l.* bearing interest, to be

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divided among my younger children, and that subject to this charge and the charges previously created, my eldest son shall take the *Kensington* estate."

It now only remains to be considered whether the mortgagees in resisting the redemption of the charge, can be in a better situation than the representatives of the tenant for life?

In the first place it is agreed, on behalf of the Appellants, that their claim is clearly barred by the following proviso in the deed of 4th *February* 1835. [His Lordship read it, *see ante*, 559.] Default never was made in payment of the interest stipulated for, according to the true intent and meaning of the indenture. Therefore Lord *Kensington* alone had a right to the interest of the 20,000*l.* assigned as a security to the mortgagees.

Besides, the interest of the 20,000*l.* appears substantially to have been paid to the mortgagees, although the payment was nominally made under the covenant, and as they have actually once had the benefit of the security, it would not be equitable that they should again claim it as an unsatisfied charge upon the inheritance.

There seems to be even less colour for the claim of the mortgagees than for the claim of the representatives of the tenant for life. For although the interest had been paid to the mortgagees by the tenant for life, he possibly might have continued to make it a charge upon the inheritance as between him and the remainder man. But if the interest which became due in the lifetime of the tenant for life has been paid to the mortgagees, they have so far realised their security, and as to them the estate is relieved from liability. But at all events, the mortgagees cannot be entitled to more than the mortgagor was entitled to: and if the interest had ceased to be a charge upon the inheritance in the lifetime of the tenant for life by payment of

interest to the mortgagees, the mortgagees who claim under him cannot support this charge against the remainder man.

For these reasons, I am of opinion that the decree of the Lords Justices ought to be reversed, and that the decree of the *Master of the Rolls* ought to be affirmed.

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Lord *Brougham* :

My Lords, I have come to the same conclusion with my noble and learned friend, and generally speaking for the reasons which he has given. I consider the third question stated by Lord Justice *Turner* to have been answered erroneously by his Lordship. I differ from him in the opinion he has formed upon it. It will be unnecessary for me to argue this case beyond what my noble and learned friend has done ; indeed I have only to refer to the last two pages of the judgment of his Honor the *Master of the Rolls*, as containing my view of the case. There is one observation that I wish to make as to the difficulty, delay, and expense of taking an account. My noble and learned friend seemed to think that the *Master of the Rolls* had stated it to be almost impossible. In the former part of his judgment he leans to that view, but in the latter part of it he does not say that it is impossible, but he talks of the difficulty, expense, and delay, of taking such an account, which he says would be enormous, and he does not see how it could be done except as against a mortgagee in possession.

Upon the whole, the reasons given by his Honor the *Master of the Rolls*, coinciding with the view which has been taken by my noble and learned friend, appear to me quite satisfactory, and I therefore agree that the decree of the *Master of the Rolls* ought not to have been reversed by the Lords Justices, and that your Lordships ought to reverse the judgment of the Lords Justices.

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Lord *Cranworth* :

My Lords, in this case I have the misfortune to differ from my noble and learned friends who have preceded me. I will shortly state the grounds upon which I have arrived at a contrary conclusion from that which they have expressed. I need not go into the facts of this case, but shall merely remark that under the settlement of the present lord in the lifetime of his father, his father having the power of charging the estates with 20,000 *l.* and interest, that power was exercised by a deed executed by the late lord on the 4th of *February* 1835, whereby he charged the estate with 20,000 *l.*, and created a term in a trustee of the name of *Whittaker*, to secure that sum. Then afterwards, we learn by the recitals in the deed under which the *Bouveries* claim, that there had been previous charges by the late lord in favour of the original mortgagees, Lord *Braybrooke* and others, for the sum of 14,227 *l.*, part of this 20,000 *l.*, and then in consideration of a large sum of 17,600 *l.* due from Lord *Kensington* to *Bouverie* and others upon other mortgages of other property, and the sum of 6,900 *l.* advanced by them to the late lord, he covenanted to pay the whole of those two sums, amounting to 24,500 *l.*, and he assigned to them his charge of 20,000 *l.*, subject to the prior assignment which he had made to secure 14,227 *l.* That was the state of the rights of these parties and their liabilities to one another.

From the time of the execution of this deed, Lord *Kensington* regularly paid interest on the whole of the debt due from him to Lord *Braybrooke* and others, which included the 14,227 *l.* 6 *s.* 2 *d.*, and I will assume that he did so (I do not think it quite clearly appears, but I will assume that he did so) also on the 24,500 *l.* due from him to *Bouverie* and others.

Lord *Kensington* died in *August* 1852. Then his son *William*, having become Lord *Kensington*, filed a bill against *Bouverie* and others, to redeem the *Kensington* mortgage, on payment to them of the sum of 5,772 *l.* 13*s.* 10*d.*, with interest from the death of his father, that being the balance of the 20,000 *l.* after deducting the 14,227 *l.* 6*s.* 2*d.* due to Lord *Braybrooke* and others, the first mortgagees. The question is, on what terms he is entitled to redeem? *Bouverie* and others contend that the sum due from the settled estate on account of the 20,000 *l.*, is the principal sum of 20,000 *l.*, with interest from the date of the charge (4th of *February* 1835), deducting only from the interest the amount of the rents received by the late lord, or accrued due in his lifetime, subsequently to the 4th of *February* 1835. The present Lord *Kensington* contends that no interest can be claimed during the lifetime of his father, as it was all paid by him to the mortgagees from time to time as it became due. Lord *Braybrooke* and others, the first mortgagees of the 20,000 *l.* were made co-defendants, but they do not wish to be redeemed, nor do they raise any question in the suit. They are satisfied with their security.

The *Master of the Rolls*, by whom the cause was heard, took the same view of the case as the Plaintiff, Lord *Kensington*, and directed an account of what was due for principal, interest, and costs in respect of the 20,000 *l.*, and an account on the other hand of what was due from *Bouverie* and others (who had taken possession as mortgagees on the death of the late Lord) in respect of rents received by them, or which, without their wilful default, they might have received. The chief clerk took this account, calculating interest on the 20,000 *l.* only, from the 10th of *August* 1852, the day of the death of the late Lord, and the

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Master of the Rolls, when the matter was brought before him, upheld the chief clerk's certificate.

There was an appeal to the Lords Justices, who took a different view of the case from the *Master of the Rolls*. They held that all the interest on the charge for 20,000 *l.* which had accrued due in the lifetime of the late Lord *Kensington* subsequently to the date of the charge, was still due, except so far as he had received rents sufficient to liquidate it; and they varied the decree on that principle. It is between these conflicting views of the case that we are now called on to decide. It is clear that *Bouverie* and others were entitled, by virtue of their security, to a charge for interest as well as principal; and the only question is, whether the interest has been so paid during the life of the late Lord as to discharge the estate from the burden. I will assume that interest was duly paid on the whole mortgage debt of 24,500 *l.*, for which the charge of 20,000 *l.*, subject to the prior claim on it, was made a security. But the argument of the Respondents was, that whatever interest was paid by the late Lord, had been paid by him, not in his character of mortgagor, nor as tenant for life of the mortgaged estate, but by reason of his covenant to pay his own debt of 24,500 *l.* and interest, which imposed on him a personal obligation to pay the interest as it became due; that he, if he were alive, or his executors, now that he is dead, would, but for the mortgage, have a right against the *corpus* of the estate for all interest on the 20,000 *l.* which the rents had failed to satisfy, and that the mortgagees have now the same rights which he or his representatives would have had if there had been no mortgage.

In order to arrive at a just conclusion on this subject, we must look to principle, and proceed in our reasoning by

steps. First, it is clear that any person entitled to an equitable charge, and filing a bill to have that charge raised, has a right against the *corpus* of the property charged, for interest no less than for principal; supposing, of course, that it is a charge bearing interest. His right to the whole principal and interest, unless barred by the Statute of Limitations, is available after any number of successive life estates. This cannot be disputed. Now, suppose the charge to be a charge in the name of a third person, as trustee for a tenant for life, on the death of the tenant for life, his executor might file a bill to have the charge raised, and *prima facie* the sum to be raised would include interest as well as principal. It would, however, be a good answer to the demand for interest, that, as tenant for life, he had, since the creation of the charge been in receipt of the rents, which were the primary fund to discharge it; and if, on taking the account, it should appear that rents had been received sufficient to cover the interest, no farther claim could be made on that head.

It was, I am aware, contended in argument, that a tenant for life cannot, in any circumstances, become an incumbrancer on the remainder for interest accrued due during his tenancy. But for this proposition, I can discover no foundation either in principle or on authority. Suppose the security to be one which during the tenancy for life produces no profit; suppose, for instance, that it is a mere reversion, or that it is a mine unproductive, or that prior mortgagees are in possession, exhausting the whole annual income; I can see no reason why, when the reversion falls into possession, or the mine becomes productive, or the prior mortgagees, being satisfied, have withdrawn, the representative of the tenant for life should not have precisely the same rights against the *corpus* which certainly a stranger would have had.

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If this is so, then it cannot make any difference in principle that the security had, by any of the means I have suggested, become productive during the life of the tenant for life. In such a case, indeed, his representatives, seeking to raise the charge, must, against their demand for interest, give credit for what he had received on account of rents and profits, but in other respects their rights under their security will remain unchanged.

These considerations lead, I think, necessarily to the conclusion, that in every case of a tenant for life, or his representatives, raising a charge out of the *corpus* of the estate charged, the question as to how far he or they may add the interest to principal depends on how far the interest has been satisfied by means of rents and profits. Under the head of "Rents and Profits," I include the benefit of personal occupation or enjoyment in any mode authorised by the deed or will creating the tenancy for life, in respect of which the tenant for life must be charged with an occupation rent in the usual manner. If this is the right of the tenant for life or his representatives, it follows that persons claiming under him as mortgagees (which is the position of the *Bouveries* in this case) must have the same right, that is, that the assignee of the charge may raise out of the *corpus* so much of the interest due on the security as has not been covered by rents and profits received by the tenant for life.

It will hardly be disputed that this is a necessary consequence of the rights of the tenant for life, if the interest has not been paid to the mortgagee who is seeking to make the charge available. The question is, what are the rights of the mortgagee of the charge if the tenant for life has, during his life, regularly kept down the interest. I do not think that such payment can of itself and alone make any difference in the rights of the tenant for life, or by cor-

sequence in the rights of mortgagees claiming under him, at all events where, as in this case, the tenant for life has come under personal obligations binding him to pay the interest. Suppose that he had come under such an obligation by a simple borrowing without assigning his charge by way of security, by bond or covenant for instance, payment of interest would in that case have had no effect on his rights on the settled estate by virtue of the charge. And how is the case altered by the circumstance that, for security of the lenders, he has assigned to them all his rights under the charge? What the rights are must remain the same, whether they continue vested in the tenant for life or his representatives, or have been assigned to others.

The only ground on which payment of interest can affect the right of his representatives against the *corpus* must be, that it manifests an intention to discharge the estate from the burden of the interest. But this would not, I think, be a just inference, unless there is something beyond the mere fact of payment. I can hardly think that even where a tenant for life under no personal obligation keeps down the interest, that alone indicates an intention to exonerate the estate in favour of the remainder man. But if such intention might in those circumstances fairly be assumed, surely the inference cannot be extended to the case where the payment is made by a person bound to pay, whatever may be his wishes or intentions.

If he is under no personal obligation it may be argued (I do not say whether successfully or not), that by voluntarily paying what he was not bound to pay, he showed an intention to benefit some one, and that the person intended to be benefited must have been the owner of the *corpus*. But I cannot understand how any inference of intention as to the motive of a particular payment can be drawn from the mere fact of payment when the payment itself was one

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interest for any considerable number of years, that might fairly be contended as amounting to *prima facie* evidence that the rents received were equal to the interest so as to cast on the tenant for life or his representatives the burthen of proving that there was a deficiency. Be that, however, as it may, the argument amounts to no more than this, that in order to do justice it may be necessary to take accounts of considerable length and complexity. I cannot feel that this raises any substantial difficulty.

In the present case there are no circumstances that I can discover to qualify or explain the payment of interest which the late lord, under his covenant, was bound to make, and I find nothing to exclude the right of his mortgagees to insist on having all the interest of the 20,000 £ raised in the same manner as Lord *Kensington*, or his executors, might have done if he had not mortgaged the charge, except so far as the interest has been satisfied by rents received by the late lord.

Several authorities were referred to in argument, but none of them appears to me to support the proposition of the Appellant. Great stress was laid on the case of *Jones v. Morgan* (z). There *William Morgan*, who, under his father's will, succeeded to the devised estates during his minority, came of age in *March* 1746, and, in the following month of *April* he took up a bond of his father, held by *Loch* for 1,876 £, and which was a charge on the settled estate, and he gave *Loch* a fresh bond for the same sum. *William* paid interest on this new bond until 1761, when he paid it off, and in 1763 he died. In 1776, thirty years after the father's bond had been paid off, *William's* administratrix filed her bill, seeking to charge the inheritance with the amount of the bond and interest. But

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Lord *Thurlow* held, that the circumstances manifested an intention on the part of *William* to discharge the estate even if he had been only tenant for life. It was unnecessary to decide any such point, inasmuch as it was held, that *William* was tenant in tail. But the circumstances there were very different from those in the present case. *William* need not have made himself personally responsible for the bond, and, therefore, in doing so, and afterwards paying it off, he might be considered as showing that he did not intend to retain any charge on the inheritance.

In the case now under consideration, the late Lord *Kensington* did not discharge any previously existing debt. He exercised a power of burthening the inheritance, and in order to obtain the benefit conferred on him by the power, he was obliged to enter into a covenant binding him personally to pay the interest on the sums advanced to him, and for security of which he assigned (*inter alia*) the benefit of the charge. I cannot see how either the entering into such a covenant, without which he could not have obtained the loan of the money, or the subsequent payment of interest, which he could not avoid paying, can be taken to indicate any intention whatever as to the inheritance. They were acts showing the intention of Lord *Kensington* to secure to himself the benefit of the 20,000 *l.*, but showing nothing more.

In *Tracy v. Lady Hereford* (a), what was decided first by Sir *Lloyd Kenyon*, and afterwards by Lord *Thurlow*, was, that a tenant for life is bound as between himself and the inheritance, to keep down the interest of an incumbrance accruing during every part of his tenancy for life, though, during the first part of that tenancy the rents may have

(a) 2 Bro. C. C. 128.

been insufficient for the purpose, that is, that the excess of rents received by him in the latter part of his life are applicable to make good any prior deficiency in relief of the inheritance. This case seems to me rather to support than to impugn the doctrine contended for by the Respondents.

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I do not go through the other cases which have been cited in argument. None of them appears to me to be at variance with what, but for the high authority of those who differ from me in this case, I should have considered to be the well established doctrine of the Court of Chancery, namely, that where the tenant for life keeps down the interest of a charge on the inheritance he becomes himself an incumbrancer on the inheritance for the amount of what he pays, so far as the payments exceed the rents and profits accruing during the tenancy for life, and that this right is not varied by the circumstance that he either originally is, or during his tenancy for life becomes, himself entitled to the charge. It is hardly necessary to add, that circumstances may show either as regards the principal or interest that the tenant for life intended to exonerate the estate. But I do not think that the mere fact that he has regularly paid the interest is sufficient to raise such a presumption, certainly not where, as in this case, all which was paid having been paid under the personal obligation of a covenant to pay.

Lord Wensleydale :

My Lords, the question in this case is, on what terms the Plaintiff is entitled to redeem a charge of 5,722 *l.* 13*s.* 10*d.*, part of a sum of 20,000 *l.* charged on his Lordship's estate by virtue of a power contained in his marriage settlement of the 10th of October 1833.

I have had an opportunity of becoming acquainted with

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the opinion of some of my noble and learned friends who heard the case, and who have kindly communicated their reasons to me, and therefore have had more than usual means of fully considering it with every light that can be thrown upon it. I am of opinion with my noble and learned friend who last addressed your Lordships that the decree of the Lords Justices ought to be affirmed.

It was supposed in the Court below, that there was proof of payment, of the rents and profits of the estate charged, to Messrs. *Bouverie's* and the other mortgagees for their share of interest and of the remainder of that interest, out of the general moneys of Lord *Kensington*. I have not been able to find any proof of such payment of interest in the printed documents laid before us. The affidavit of Mr. *Tatham* states, that from 1846, Messrs. *Tennant & Harrison*, either out of the rents of the estate, or out of money received by them for Lord *Kensington*, regularly paid the interest on the 60,000 *l.* and 14,277 *l.* 6 *s.* 2 *d.*, part of the charge of 20,000 *l.*; and he believes that interest, in respect of the residue of the said sum of 20,000 *l.* (viz. 5,722 *l.* 13 *s.* 10 *d.*), was duly paid out of moneys belonging to Lord *Kensington*; and that at the time of Lord *Kensington's* death there was no arrear of interest. This is not sufficient proof of payment, and I do not find any other. But certainly there is none that the interest of the 20,000 *l.*, charged on the estate was ever paid on that account specifically. It may be that the interest on the sums advanced on mortgage and covenanted to be paid, and particularly the interest of 24,500 *l.*, which was covenanted by the late Lord *Kensington* to be paid to Messrs. *Bouverie*, was paid according to his covenant. For that amount he was personally responsible, and he probably discharged himself from his personal responsibility. All the interest upon the 24,500 *l.* may therefore be presumed

to have been paid, but though at first sight it would appear that the interest upon the 5,722 *l.* 13 *s.* 10 *d.*, part of the 20,000 *l.*, and forming part of the security for the 24,500 *l.*, was therefore paid, I think that it does not follow.

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I was much struck by the argument of Messrs. *Lloyd & Shapter* at your Lordships' Bar (which I observe was urged in the Court below) that the payment of interest on the 24,500 *l.* did not involve payment of the interest charged on the estate of the 5,722 *l.* 13 *s.* 10 *d.*, part of the 20,000 *l.* I think their argument is correct. The charge on the estate of 20,000 *l.* and interest from the date of the charge (in effect a charge of 20,000 *l.* and an additional charge of 1,000 *l.* per annum till paid) is, (subject to the prior charges, leaving a balance of 5,722 *l.* 13 *s.* 10 *d.*) with many other securities, made a security for 24,500 *l.* and interest covenanted to be paid, not the principal of the 20,000 *l.* (subject as aforesaid) for the principal, and interest for the interest, but principal and interest together for the whole debt. After the receipt of interest by the mortgagees on the principal sums due to them by covenant, and by Messrs. *Bouveries* in particular on the 24,500 *l.*, covenanted to be paid to them, there was nothing to prevent any of the mortgagees applying their share of the interest charged on the estate, which was a security for their whole debts respectively, to pay off a part of their principal debts with it. It might happen to become necessary to do so in order to pay that principal in full. The receipt of the interest, or the debt itself, therefore, by no means affects the rights of the mortgagees to pay a portion of the principal money of these debts by means of this charge of interest on the land, and therefore does not amount of itself to the payment of interest, part of the charge, and is not equivalent to a specific payment of that interest. If the interest had been paid, and received specifically on account of the

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interest of the charge, the land would have been *pro tanto* exonerated, and the charge to the extent of that interest satisfied, but not if the interest was paid on the whole debt of 24,500 *l.* in discharge of the covenantor's personal liability, any more than if a bond had been given to secure the debt and the interest on that bond paid. I think, therefore, that, in this case, in effect, no part of the interest of the 5,722 *l.* 13 *s.* 10 *d.* part of the 20,000 *l.* charge has been paid, and not having been paid, the whole remains due, less the rents and profits, and Messrs. *Bouverie* have a right to demand all the share of the debt mortgaged to them, viz., 5,722 *l.* 13 *s.* 10 *d.* and interest, which the rents and profits of the estate were insufficient to satisfy. If the interest has not been paid, no question arises as to the intent with which Lord *Kensington* paid the balance, and whether it was a charge on the inheritance or not.

Though this argument was pressed in the Court below, that Court did not give effect to it, but decided upon a different ground. It was assumed that the interest had been paid on the charge itself, and in exoneration of the estate, and the *Master of the Rolls* held that Messrs. *Bouverie* were not entitled to have the interest paid prior to the death of Lord *Kensington*. The Lords Justices held that they were, so far as the rents and profits were deficient. On the assumption that the interest on the charge has been regularly paid by the rents and profits, and by the monies of Lord *Kensington*, I agree with my noble and learned friend (Lord *Cranworth*) that the decree of the Lords Justices is right.

It is argued that if a tenant for life pays off the principal of a charge, he must be taken *primâ facie* to mean to continue the charge for his own benefit. But it is said that there is a difference between the payment of principal and of interest; I must own I cannot see the distinction.

The tenant for life is not bound to pay the interest upon any charge beyond the amount of the rents and profits; the difference is a charge upon the *corpus* of the estate, and if the tenant for life pays off that charge, I do not see why the presumption should not equally apply to the discharge of that part of the incumbrance which the tenant for life is not bound to pay, as well as to the discharge of that part of the incumbrance which consists of principal, and which he is likewise not bound to pay. And if in one case no notice is necessary to be given to the remainderman of an intention to keep alive the security in order to make it effective, I do not see why any notice should be necessary in the other. The reasoning of Lord Justice *Turner* is, to my mind, perfectly satisfactory upon that point.

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If I rightly understand the argument of my noble and learned friend on the woolsack, he considers this case as substantially between the present Lord *Kensington* and the legal personal representatives of his father; and that if this charge could not be lawfully claimed by them, the mortgagees could not be in a better condition, and he thinks that the representatives would be told that there was a presumption that the rents and profits were equal to the interest, and they would not be let in to rebut that presumption.

It is the latter part of this proposition only that appears to me, with deference, incorrect. I am not aware that there is generally such a presumption. It must depend upon the circumstances of each particular case. Where a property has been recently mortgaged, there may be such a presumption; for persons commonly do not lend except when the rents considerably exceed the interest of the money advanced; but when an estate is charged to the extent that this is, I cannot agree with my noble and

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learned friend that a presumption exists. On the contrary, the Plaintiff, if claiming under the marriage settlement by which the *Kensington* estate appears to have been charged with the interest of the mortgage for 60,000 *l.*, an annuity of 156 *l.*, and the interest of the charge of 20,000 *l.*, must be taken to have known the extent of the incumbrances, and of course knew the annual value of the estate, which is stated in the schedule to that deed to have been about 2,914*l.*, and he could not be presumed to have believed that the rents and profits would be sufficient to pay the interest. He must have known to the contrary from the first, and must have understood that the interest was paid (if it really was paid, on which I have already said enough), in a great measure from the private funds of the tenant for life. There has been no concealment by the tenant for life, no deceit actual or constructive, by him, no disregard of any known duty, and I cannot see how the Plaintiff's position, as remainder-man, has in any way been altered by the conduct of the tenant for life.

Upon the whole then it seems to me, on the assumption that the charge of interest has been paid off, that this is the ordinary case of a tenant for life paying off a charge on the *corpus* of the estate which, as between him and the remainder-man, he was not bound to pay. And I concur with my noble and learned friend (Lord *Cranworth*), that the judgment of the Lords Justices was right. And I agree with him as to the principle on which the account ought to be taken.

Lord *Chelmsford* :

My Lords, the short question in this case is, whether the Plaintiff, Lord *Kensington*, is entitled to redeem a charge of 20,000 *l.* upon his estate, on payment of the principal and the interest which has become due since the

death of the late Lord *Kensington*, his father; or whether he is bound, in addition, to pay certain arrears of interest which accrued during the life of the late Lord. The power under which the charge was created, and the terms of the deed by which it was raised, have been fully stated; and I may therefore put the question in a more general form. Where a tenant for life in possession has power to create a charge in his own favour, and he exercises the power, and afterwards mortgages the charge, if the rents and profits of the estate are insufficient to keep down the interest of the charge, and the tenant for life regularly pays from year to year all the interest which becomes due upon the mortgage, do the arrears of interest upon the charge, beyond what the rents and profits will satisfy, become at once a charge upon the estate to which either the representative of the tenant for life is entitled, or of which the mortgagee of the charge can claim the benefit in satisfaction of the principal of his mortgage?

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There is no doubt that if a tenant for life pays off a charge upon the estate, without more, he is presumed to have meant to leave the charge upon the estate, and he becomes a creditor for the sum which he so pays. A simple payment of the charge is sufficient to establish his right to have the charge raised out of the estate. He has no obligation or duty to make a declaration to that effect, or to do any act demonstrating such an intention. But of course any declaration by him, or, as Lord *Thurlow* says, in *Jones v. Morgan*, "the smallest demonstration that he meant to pay off the charge will prevent his representative coming for the money." A different presumption, however, may not unreasonably be considered to arise where the tenant for life pays the interest upon a charge beyond what the rents and profits will satisfy. It is his duty to keep down the interest to the extent to which the rents and profits

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will enable him to do so, and the remainder-man is only interested in ascertaining that this duty is performed. If it is neglected, the remainder-man may file his bill to make the rents answerable; but if the interest is regularly paid, he need not concern himself farther. I do not go the length of saying that it ought to be presumed in such a case that the rents and profits are sufficient to enable the tenant for life fully to keep down the interest, but I do think that it is the duty of the tenant for life, if he intends that the surplus interest shall be a charge upon the estate, to make some declaration, or to do some act demonstrating this intention. This appears to have been the opinion of Lord *Thurlow*, for he says in *Jones v. Morgan*, "he paid interest much beyond what the profits of the estate would have discharged, which is a demonstration, *prima facie*, that though tenant for life, he meant to discharge the estate." It may, perhaps, be too much to assert that the mere payment of interest, beyond the profits, will be sufficient to raise the presumption of an intention to exonerate the estate, as it would thus arise immediately upon such over payment. But, as it appears that, even in the case of paying off an incumbrance, any demonstration that it was not to continue to be a charge on the estate, will be sufficient to exonerate it where a tenant for life goes on year after year applying the rents and profits as far as they will go in keeping down interest upon a charge, and paying the deficiency out of his own funds without any notice or claim, may it not reasonably be presumed from his conduct that he meant what he has done in exoneration of the estate, more especially where the estate is in settlement, and the person entitled in remainder is his own son?

If a different rule were to prevail very inconvenient and serious consequences might result to the remainder-man. For 30 or 40 years payments might be going on which he

ight reasonably suppose were only in performance of the duty of the tenant for life, and at the end of that long period a heavy accumulated charge might suddenly be thrown upon the estate. If he is ignorant of the insufficiency of the rents and profits to keep down the interest, he may fairly assume, from the silence of the tenant for life, that they are sufficient for the purpose. If he knows at the rents and profits are not sufficient he may well believe that it is the intention of the tenant for life toonerate the estate. So in dealing with the reversion, great embarrassment and difficulty might arise from holding that a charge was created by the mere payment of interest beyond the profits, as inquiry would in all such cases be necessary not only whether the interest had been paid, but also how it had been paid; that is, whether out of the rents and profits or by the funds of the tenant for life. And as, according to the opinion of Lord Justice *Turner* upon the authority of *Burrell v. Lord Egremont*, the Statute of Limitations would not apply to this case; the state of things suggested in argument may be conceived to arise, that for ten years or more the tenant for life might have gone on paying interest beyond the amount of the rents and profits, and afterwards for twenty years they may have been sufficient to meet the interest, and then at the death of the tenant for life his representative would have a right to claim the excess of interest on the ground of a charge silently imposed so many years before.

It appears to me that the argument was a good deal embarrassed by considering the payments made to the mortgagees as being made with reference to the rents and profits, and so entitling the mortgagees to stand in the place of the representative of the tenant for life. The

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correct view of the case is, that the receipt of the rents and profits by the tenant for life was virtually a receipt for so much interest upon the charge of 20,000 *l.* The payment of interest upon the mortgages, under the personal obligation of the tenant for life, was a matter wholly distinct and collateral. The rents and profits were not specifically applied to payment of the interest on the mortgages, and, therefore, the assertion which was made during the argument that no part of the interest on the charge of 20,000 *l.* had been paid, because the rents and profits had been applied, as far as they would go, to the interest due to the mortgagees, is a misapprehension and only tends to confusion. The tenant for life is bound to keep down the interest of the charge to the extent of the rents and profits. He is bound by his personal covenant to pay the interest upon the mortgage, not out of the rents specifically, but out of his own funds generally. He pays the interest on the charge of 20,000 *l.*, *pro tanto*, by his receipt of the rents. He pays the interest of the mortgage in full out of his own funds. The mortgagees cannot complain, for they have received their full interest, nor as long as their interest is paid, have they anything to do with the receipt or the application of the rents and profits. This is expressly provided for by their mortgage deed in the clause read by my noble and learned friend on the Woolsack. They can have no case unless they can establish that, the rents and profits being unequal to the payment of the interest on the charge of 20,000 *l.*, so much as was thus deficient must be regarded as unsatisfied interest, and as continuing to be a portion of their security for the payment of the principal of their mortgage. But even as between them and the tenant for life, or his representative, as long as their interest was paid, the tenant for life might deal with the interest of the

20,000 *l.* as he pleased. He might have expressly discharged the estate by acknowledging the receipt of the whole interest upon the charge, or by an express declaration that he would exonerate the estate from it. He might have acted so as to make his conduct amount to a demonstration that this was his intention. It appears to me that the circumstances of the case are sufficient evidence that he meant to exonerate the estate. How then can his representative after his death repudiate this intention, or the mortgagees insist upon a charge which they could not have compelled the tenant for life to create in their favour, and which by his acts he had disclaimed. The mortgagees can have no right at all unless it can be derived through the existence of a charge in favour of the tenant for life for the interest which the rents were unequal to pay. They have entirely failed to prove that such a charge exists, and I think that the Plaintiff is entitled to redeem the incumbrance of 20,000 *l.* on payment of the principal, and of the interest which has accrued since the death of the late Lord *Kensington*. The decree of the Lord's Justices must, therefore, be reversed, and that of the *Master of the Rolls* be affirmed.

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The Attorney General :

Will your Lordships forgive me for suggesting the form of the order. Discharge the order of the Lords Justices, and declare that the *Kensington* estate is not chargeable in favour of the mortgagees or the representatives of the late Lord *Kensington* with the difference between the amount of the rents and profits of the estate and the interest of the sum of 20,000 *l.* received and accrued due respectively during the life of the late Lord *Kensington*. And with this declaration remit the cause to the *Rolls Court*. This is

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necessary, because there was no formal decision at the *Rolls*, but the case, after his Honor had declared his approval of the clerk's certificate, was carried by arrangement to the Lords Justices.

Order appealed from discharged, and cause remitted with a declaration.

Lords' Journals, 25 *July* 1859.

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Nuisance.
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"Lands
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GAS LIGHT and COKE COMPANY - *Appellants.*
SAMUEL BROADBENT - - - *Respondent.*

If a Plaintiff applies for an injunction in respect of a violation of a common law right, and the existence of that right, or the fact of its violation is denied, he must establish his right at law, but having done that, he is, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation.

For such a purpose the award of an arbitrator is equivalent to a verdict.

If between the time of the case being referred and the award being made there has been an alteration in the mode of carrying on the business complained of, it may, if in diminution of the cause of injury, be shown as an answer to the application for an injunction; but if in increase of the cause of injury, it need not be the subject of a fresh proceeding at law; that is matter for the discretion of the Court of Equity.

A Plaintiff brought an action to recover damages for an injury to his business, occasioned by the erection of gas works; the action was referred to arbitration; nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected; two months after the date of the award the injunction was applied for: *Held*, that there had not been any such acquiescence as to deprive the Plaintiff of his right to the injunction.

The 68th section of the "Lands Clauses Consolidation Act" applies only to things done under the powers conferred by the Legislature. For anything else, the common law remedy is properly applicable.

THE Respondent was the occupier of some market gardens near Fulham, under a renewed lease (the original lease having been granted to him in 1836) to commence from *December* 1853, for a term of twenty-one years, at the rent of 98*l.* a year. The Appellants had been incorporated by private Acts of Parliament as a company to supply certain parts of the metropolis and suburbs with gas. All these Acts were repealed, and their provisions consolidated by the 17 *Vict.*, c. lv. By that Act the “Companies’ Clauses Act 1845,” (except so much thereof as related to the recovery of damages not specially provided for and penalties,) the “Lands Clauses Consolidation Act, 1845,” with certain exceptions, and the “Gas Works’ Clauses Act, 1847,” were directed to be incorporated therewith.

In *May* 1856, the Respondent filed his bill against the Appellants, charging that up to 1851, they had manufactured gas in a retort house 335 feet distant, in a straight line, from the nearest part of Respondent’s grounds; but that in that year they had erected a new retort house, distant only forty feet from his grounds; that this new retort house was very large, and contained many openings, from some or all of which, at several hours during the day and night, noxious gases were emitted, highly injurious to his flowers, fruit, and vegetables; that in *March*, 1854, he brought an action in the Court of Common Pleas, which was, on the recommendation of the *Lord Chief Justice*, referred to Mr. Serjeant *Channell*, who was to decide on all matters in difference between the parties; that on the 2d *January* 1856, the arbitrator made his award, by which he directed that a sum of 250*l.* should be paid by the Appellants, as for damages up to the time of action brought, and a farther sum of 70 *l.* for damages between that period and the date of the order of reference; and he complained that the Appellants had not abated, but had

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continued the same, and had erected another retort house which added to the amount of the injury, and the bill prayed that the Appellants might be restrained from manufacturing gas in any retort house nearer to his premises than that which had been used previous to 1851.

By arrangement between the parties, the motion for an injunction was to come on as a motion for a decree on the 29th *July*, 1856. Affidavits were filed on both sides; the cause was heard on the 2d *August* and 5th *November* 1856; and, on the latter day, Vice Chancellor *Wood* made an order for an injunction. This order was affirmed by the *Lord Chancellor*, on appeal, on the 31st *January*, 1857. The present appeal was then brought.

Mr. *Rolt* and Sir *H. Cairns* (Mr. *Baggalley* was with them) for the Appellants:

In order to maintain an injunction of this kind, the Applicant must first of all establish at law the fact that a nuisance exists. That has not been done. The award, even if it is to be treated as a judgment at law, (which is not admitted,) declares nothing else than that up to the time at which it was made there had been injury, and it awards compensation for that injury. The arbitrator had power expressly given to him to "order what, if anything, should be done by either of the parties in the premises." His decision was to conclude everything. That was the consideration on which the Appellants submitted to the reference. The award is, therefore, either entirely conclusive, and the Respondent is estopped from farther proceedings, or it is entirely void, and no application to the exercise of the power of a court of equity can be founded upon it. If there is now a ground of complaint, the Respondent must proceed to establish it at law. If he attempts that, the Appellants will show that great improve-

ments have been made, and that he has now no ground to ask for this interference of the Courts.

Then again, if the award was to be treated as ground for an injunction, the Respondent has been guilty of delay in his proceedings.

It is not every annoyance that will give a party a claim to relief. In *Hule v. Barlow* (a), which was an action for a nuisance in burning bricks, the learned Judge told the jury that "no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its so being carried on," and this direction was sustained by the Court. That principle was acted on in *The Attorney General v. The Sheffield Gas Consumers' Company* (b). The Appellants here were carrying on a lawful trade in a convenient place. In order to have an injunction there must be a material injury amounting to a nuisance, and which requires not only to be redressed by damages, but, upon equitable principles, prevented, *The Attorney General v. Nicholl* (c); and where the injury is one which does not require preventive interposition before a trial at law, and the legal right is doubtful, an injunction will be refused, *Wynstanley v. Lee* (d), *Elmhirst v. Spencer* (e), and subsequent acquiescence will defeat the right to the injunction, *Rochdale Canal Company v. King* (f). [*The Lord Chancellor*: That case did not rest on the question of nuisance, but on acquiescence.] The Respondent ought to have obtained this relief by applying to the arbitrator, under the authority contained in the order of reference, or he ought now to proceed by a fresh action to establish at law his right to come for this injunction, in respect of this alleged increase of injury.

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(a) 4 Com. Ben. Rep. N. S. 334.
(b) 3 De G. M. & Gord. 304.
(c) 16 Ves. 338.

(d) 2 Swanst. 333.
(e) 2 M'N. & Gord. 45.
(f) 2 Si. N. S. 78.

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The award has no effect on that. In a case like this, a party can only come into equity after having established his right at common law in a way to satisfy the conscience of a court of equity; and he must also show that the balance of convenience is in his favour, for where, as in a case like this, the result might be to deprive the public of a benefit, the Court will not act without considering that question. The award here is, no doubt, conclusive as to the damages sustained up to the date when it was made, but no more, and there is no instance of a court of equity having granted an injunction on an award.

[The *Lord Chancellor*: It never refused an injunction on the ground that there was an award and not a verdict.]

It is still competent to a Court of Equity to inquire whether the cause of the complaint has not been removed and the evidence given before the arbitrator having stopped at a certain point, is not to be eked out by affidavit.

[The *Lord Chancellor*: The affidavits are produced to show that the nuisance in respect of which the arbitrator gave damages, has not only been continued but aggravated. Was there ever a case in which, after a trial with a satisfactory result, upon some alteration being alleged to be made, the Court has said an injunction cannot be granted till there has been a second trial?]

The granting of a perpetual injunction is not a matter of course, even after a verdict at law; all the circumstances must be looked to. This company is not a mere trading company; it is established by Act of Parliament, and has a public duty to perform.

[The *Lord Chancellor*: For the performance of which supposed public duty, however, no *mandamus* would lie.]

But at all events the Appellants ought not to be perpetually restrained from the making of gas, in the use of which a large body of the public is interested.

then again, the "Lands Clauses Consolidation Act, 1845,"
be read with the Appellants' Special Act, and that is
r to the present proceeding. The Respondent ought
ve proceeded under the 68th section of that statute.

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The Attorney-General (Sir *R. Bethell*) and Mr.
Jolliffe for the Respondent :

The *Lord Chancellor* intimated that their Lordships
of opinion that the 68th section of the "Lands
ses Consolidation Act" only applied to cases where
y was occasioned by works necessarily done under the
ority of the Act, but not to those where injury was
sioned by a careless or improper mode of conducting
usiness of a company.]

ere is no difficulty in the other points of the case.
ward is, for all these purposes, perfectly equivalent to
rdict, and the circumstances here do not affect that

While the arbitration was pending a new retort-
e was built; and as to that the arbitrator had no
er to interfere, and he was thus, by the Act of the Ap-
nts themselves, prevented from ordering what should
one between the parties. The grant of a perpetual
action will only have the effect of restraining the Ap-
nts from continuing and aggravating the injury of
h the Respondent complains; if the nuisance is got
of, the Appellants can apply to the Court.

here has been no delay here; the Respondent has duly
ecuted his rights.

The Lord Chancellor (Lord *Campbell*):

ly Lords, In this case I am of opinion that the injunc-
was properly granted by Vice-Chancellor *Page Wood*,
that his order was properly confirmed by Lord

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Chancellor *Cranworth*. I will very briefly state the reasons on which that opinion is founded.

There is no doubt whatever that before a perpetual injunction can be granted, the party applying for it must establish his right by a proceeding at law. But, it seems to me that that condition was most fully complied with by the party applying for this injunction. He brought an action against the defendants, in which he substantially alleged that they had by their works wrongfully injured his land and destroyed his vegetables and his flowers. The defendants substantially said that they had done nothing except what they had a right to do, and that the Plaintiff had not been damnified by anything that they had done. This case came on to be tried before Lord Chief Justice *Jervis* and a special jury.

If, after a trial to which no objection can be made, a special jury had found a verdict for the Plaintiff with 250*l.* damages, the jury thereby finding that the defendants had wrongfully injured the Plaintiff, that their works had been so conducted that the produce of the Plaintiff's land had been materially injured, that the defendants had done what they had no right to do, and that thereby the Plaintiff had been damnified, and no objection had been made to that verdict, and it was entered on record, and remained unimpeached, I presume that that would have been considered as establishing the right of the Plaintiff, and that it would have been considered that the Plaintiff had shown that he had a right to the enjoyment of the land without this nuisance, and that the defendants were guilty of the nuisance by the manner in which they had conducted their works; and whether that was done skilfully or negligently I think would be quite immaterial, if they had been guilty of some excess in the carrying on of their works, whereby the

Plaintiff had been injured, in violation of the maxim, *Sic tere tuo ut alienum non lædas*.

Instead of the jury hearing the case and giving a verdict, it was agreed that it should be referred to the arbitration of Mr. Serjeant *Channell*. I believe that the counsel for the Appellants hardly contended that the finding of the arbitrator would not have been equivalent to the finding of a jury, if there had been nothing particular in this submission. I should say that it not only was equivalent to the finding of a jury, but if my conscience were to be consulted, I should say that in this case it really was better. As the law now stands, parties may at any time dispense with a trial by jury, and have the case tried by a Judge without a jury. That is done, not very frequently, but now and then. I have myself tried cases without a jury, sitting on the bench and proceeding judicially. Now if these parties had dispensed with a jury and had asked Lord Chief Justice *Jervis* to try the case without a jury, and he had found a verdict, could it be said in a Court of Equity that the case had not been properly considered in Court? Then where is the difference that instead of Lord Chief Justice *Jervis* sitting in judgment, it is referred to Mr. Serjeant *Channell*, who had a much better opportunity of considering the matter than any Judge or jury could have, because he could go and take a view, he could examine witnesses on the spot, he could wait from one season to another, if necessary, in order to see what the effect of the works might be. Well then, it seems to me that this award must clearly be considered as establishing the right of the Plaintiff at law, as much as if it had been the verdict of a jury.

But then it is said that the submission in this case was a peculiar sort of submission, and that it is therefore taken quite out of the common course. The submission is pre-

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cisely according to the common form upon such occasions. Upon occasions where there is a dispute about water-courses, or about nuisances such as this, it is very common to introduce the words which we find here, "with power to order what, if anything, shall be done by either of the said parties in the premises;" the meaning of that clause is not that it at all abridges the power of the arbitrator respecting what is submitted to him, or that it in the slightest degree impairs the effect of his finding, but it gives him power, upon the application of the parties, to direct how the water-works or how the gas-works shall be conducted *in futuro*, but if that power is not called into exercise by the parties, but the award is made without exercising it, the award has precisely the same effect as if the submission had not contained that power. Therefore, I think if the Appellants made no application whatsoever to Mr. Serjeant *Channell* to direct what was to be done; if they still contended that they had done nothing that was wrong, and there was no proposal by them of any peculiar mode in which the works should be conducted, it may be considered that this clause is struck out of the submission, and that the award is an award made upon the common form of submission to arbitration.

My Lords, if that be so, and things continued after the award as they were before, and the nuisance was not removed, and it was proved to the satisfaction of a Court of Equity that the nuisance still continued exactly as it was, that there had been no alteration whatever in the works, but that they continued to be carried on precisely as they had been, and producing the same effects upon the land of the Plaintiff, I have no doubt that such facts establish a case for applying to a Court of Equity for an injunction. Supposing that there had been no alteration, but that things continued precisely as they were, that the Appellants obsti-

nately refused to make any change whatever, and that it was proved to the Court that they allowed things to remain as they were, and that they carried on their works as they did at the time the action was commenced, and at the time when the award was made, I cannot doubt for a moment that under such circumstances, upon proof that the nuisance continued, an injunction would follow as a matter of course.

But then, it is said, that a new trial was necessary here, because there had been some alterations. That there had been some alterations after the submission is proved. I consider that that is a point upon which it is for the Equity Judge to form his opinion. If there has once been a trial at law and the Plaintiff's right has been established at law, I think it is for the Equity Judge to determine, when the application is made for the injunction, whether the nuisance continues, or whether it has been abated, and if he is of opinion that it has not been abated but that it still continues, then it is his duty to grant an injunction. It seems to me, indeed, very strange to contend that because a party who commits a nuisance chooses to make some alteration, even although he may do it *bonâ fide*, it is to be laid down as a rule that there must be another trial, and that *toties quoties*, as often as the parties shall make any alteration there must still be another trial. I asked that learned and experienced counsel for the Appellants, Sir *Hugh Cairns*, whether there was any instance of a second trial being had after the first, under such circumstances ; no such case can be cited, because none such, I think, has ever occurred. I think that the *Vice Chancellor* did well in investigating whether the nuisance continued, and that it was quite unnecessary for him to order a second trial in order to try a fact which had already been investigated and established.

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Then, my Lords, does the evidence support what the Vice Chancellor decided, viz., that the nuisance did continue? I have carefully examined the evidence, and from that it may be seen that there was abundant ground upon which he was justified in coming to that conclusion, and I cannot by any means say that he was wrong in saying that the nuisance did continue, because the evidence seems to be that it continues, and that it has been aggravated. Then, under these circumstances, unless there is something peculiar in this case, it would be a matter of course to grant an injunction.

It is argued that it is highly inexpedient in this case to grant an injunction. Why, this is the very case for an injunction, because it is a case in which an action cannot sufficiently indemnify the party who is injured. How can he prove to a jury the exact quantity of pecuniary loss that he may have sustained? He may be able to show the value of the flowers and trees that have been destroyed, but how can he show the irreparable injury done to his trade by his customers leaving him, whom he may find it most difficult or impossible to get back.

Then we are told that an action is to be brought, I know not how often, I suppose an annual action, that actions are to be multiplied indefinitely. I cannot but think that this would be a denial of justice to a person who has proved the injury he has sustained, especially when the party of whom he complains still obstinately persists in doing what produces effects so injurious to him.

Well, then, what is the great inconvenience that is to arise to the Appellants? It is said that they have a duty to perform to the public. I consider that this is to be regarded as a mere commercial adventure; they have the liberty to make these works for their own profit, but no indictment would lie against them for omitting to do so; no

action could be maintained against them if they could not supply gas. But, my Lords, what reason is there to suppose that they could not go on supplying gas as they did before the new retort was resorted to? They supplied a large district before, and that district may still be supplied, and they may, for anything I know, discover some chemical ingredients by the use of which the noxious effects of the gas, of which the Plaintiff complains, may be neutralised. The Appellants are at liberty, under the injunction, to carry on their works so that they do not injure the Plaintiff, and they must either find out some mode by which they can carry on their works without that injury, or they must limit the quantity of gas to that which they made before this new retort was constructed. I do not believe that the public will at all suffer from this injunction being maintained.

Then, again, laches are imputed to the Plaintiff; I can find no such laches; there is some forbearance shown by him; he does not seem to have been fond of going to law; he did not complain until the evil became so serious that his ruin was inevitable unless some redress was obtained. In the year 1853 he gave notice to the Appellants of his complaint, and that complaint not being listened to, he brought his action. I see no laches whatever to be imputed to him in bringing his action at law.

Then it was argued by the counsel for the Appellants that there had been laches in applying for the injunction. It turns out that that is wholly untenable, because the award was in the month of *January*, and I think it was in the month of *May* that the application for the injunction was made.

Under these circumstances, therefore, it seems to me that there is nothing to take this case out of the common

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course, and that the legal right being established, the injunction ought to remain.

There is only one other matter that I ought to refer to, which I shall do very briefly, and that is the question, whether there was any remedy for the Plaintiff under the Lands Clauses Consolidation Act? If there had been such a remedy that would be a ground for refusing the injunction; but, my Lords, it has been determined over and over again, in every Court in Westminster Hall, that under that clause there is no ground for seeking for compensation except for that which is done under the powers conferred by the Legislature. If there is wrong done which is not authorised by those powers, the common law right of action exists for it, and that is the ground on which this injunction has been granted. For these reasons, I must advise your Lordships that this appeal should be dismissed with costs.

Lord Kingsdown :

My Lords, I entirely concur in the advice which has been given by my noble and learned friend on the Woolsack; I believe that the Court of Chancery could have pursued, in this case, no other course than that which it actually has pursued. The rule I take to be clearly this: if a Plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation. Now, in this case, there has been a trial at law, and that trial at law has resulted in the affirmance of the right of

the Plaintiff, and it is admitted, that for all the purposes of that action, the finding of the arbitrator by his award is as conclusive upon the parties as a judgment would have been in a court of justice.

But it is said, that it is not for the purposes of this question now before the House equally conclusive, and, as I understand the argument, principally for this reason, that it is said that it never was the intention of the parties, in entering into this reference to arbitration to submit to the same consequences as would have resulted from a verdict by a jury, but that it was intended that the arbitrator, by his award, should provide for the future regulation of these works in such a manner as to prevent their stoppage, and to prevent an application to a Court of Equity. Now, my Lords, I see nothing which affords the slightest reason to believe that the parties, in entering into the reference, meant anything else than that which in law they must be presumed to have meant, namely, to abide by the result of the arbitrator's award as if it had been the verdict of a jury. If there had been any desire on the part of the Appellants to provide a mode of regulation of these gas-works which should prevent the necessity of an application to a court of justice to stop the works, or to stop the execution of those works in the manner in which they were then conducted, it would, I apprehend, have been the duty of the Appellants to make some proposal before the arbitrator for that purpose. But what did they do? They insisted, as they had a perfect right to do, that what they were doing was in the legitimate exercise of those rights with which they were intrusted by the Legislature, and that the Plaintiff had no ground of complaint. Instead, therefore, of proposing that the arbitrator should suggest a mode, or should direct a mode of regulating the works, they proceeded, notwithstanding notice from the

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Plaintiff's solicitor of the consequences which would follow, actually to extend these works by building a new retort.

The award was not made until *January* 1856, and supposing that award had followed immediately upon the trial of the action, it is hardly disputed that the necessary consequence would have been that, upon the foundation of the award, an injunction would have been granted. But it is said that between the period when the action came on for trial and the period at which the award was made, an interval had elapsed of a year and a half, and that during that period alterations had been made in the works which made the award, which must be taken as referring to the state of things existing in 1854, no longer conclusive as to the state of things existing in 1856. Well, my Lords, I perfectly admit that if it could have been shown upon the application for the injunction, which was made within a few months after the date of the award (though as Mr. *Rolt* justly said nearly two years after the date of the reference to arbitration), if upon that occasion it could have been shown that alterations had been made which had had the effect of removing the evil which the Plaintiff had complained of in the action, he would of course not have obtained any injunction. But I am not at all prepared to admit that the Court was bound to ascertain that fact by directing the trial of an action at law. It remained for the party who resisted that application to show that those alterations had been made which were effectual for the purpose, and if the Court, upon the evidence, had reasonable doubt upon that subject, it might, for the information of its conscience, have directed a trial; but it was equally competent to it, and, in my opinion, it was its duty, if it saw upon the examination of that evidence that the evil had not been diminished, to act upon that conviction, and to grant the injunction which it actually did grant.

This injunction having been granted, what is the course then pursued? I could not look at the last affidavit which was brought under our notice by the *Attorney-General*, the affidavit of the engineer of the company, without seeing that it was not until the injunction had been granted, that any real attempt was made to stop the injury which these works inflicted upon the Plaintiff. Nor can I read that affidavit without seeing that it was only for want of those proper exertions being made that the evil continued to exist, so far as it did continue to exist up to the time when the injunction granted was confirmed by the *Lord Chancellor*.

The same observation applies with great force to that which alone I think could excite any doubt in this case. It is said that the balance of inconvenience is so great against granting an injunction that it ought not to be done; that, in one view of it, it may stop these large and expensive works to the great injury of the public, while, on the other hand, the only inconvenience to which the Plaintiff in the suit will be subjected, is the inconvenience of the trifling damage, it is said (but be it trifling or large makes no difference in principle) that he may sustain from time to time for which he may recover compensation by action. But, my Lords, I find it here distinctly stated by the engineer of the company that there is no difficulty whatever in guarding against all the evils which arise from the execution of these works in the mode in which they are now conducted, and that a period of six months, I think, would be necessary for that purpose. Well, the Appellants had a period granted, I think from *January to March*, they then applied for an extension of that period, and it was then stated that this remedy might be afforded in a complete form; and I have not the least reason, from anything I can see, to doubt that these statements are perfectly well

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&c. of the
IMPERIAL
GAS LIGHT
and COKE
COMPANY.
v.
BROADBENT.

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 The
 DIRECTORS,
 &c., of the
 IMPERIAL
 GAS LIGHT
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 COMPANY
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founded. Well, then, my Lords, what is this case? Instead of adopting that course they come to appeal against an order which seems to me to be entirely well founded, and to be the only order which the Court could have made, and which can do them no prejudice if they will only perform their duty towards this gentleman and towards the public, by doing that which they say they are able to do, by preventing all injury to his property by their works. I think that there never was an application made to your Lordships that was more utterly ill-founded, and I hope that your Lordships will dismiss the appeal with costs.

Lord *Cranworth* :

I do not think it necessary to say more than a few words in addition to what has been said by my noble and learned friends. The views that I take of this case are on record, and I can only say that I fully adhere to the judgment which I pronounced in the Court of Chancery. By the judgment I pronounced, of course I mean the judgment which I pronounced when I disposed of the matter in *January* 1857. The case upon the evidence stands thus. [His Lordship here went through the evidence, and added:—]

It appears to me, therefore, that there is distinct evidence that the crops were more injured, and that there was a great increase in the volume of smoke ; and all the witnesses say that these injurious effects have been materially aggravated since the building of the new retort house.

Orders appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 5 *August* 1859.

JAMES RORKE - - - *Appellant in Error.*

MICHAEL ERRINGTON - - *Respondent in Error.*

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*"Incumbered
Estates Act."
Conveyance
under.
Mistake.*

A CONVEYANCE made by the Commissioners of the Court for the Sale of Incumbered Estates in *Ireland* is, under the 27th section of the 12 & 13 *Vict.* c. 77, "effectual to pass the fee simple discharged of all former estates," subject only to "such tenancies, leases, &c. as shall be expressed therein." Where such a conveyance is duly executed by the Commissioners, it becomes under the 49th section conclusive evidence that everything required by the Act to be done has been rightly done.

An application was made to the Commissioners for the Sale of Incumbered Estates in *Ireland* to direct the sale of an estate, the property of *H. R.* held a lease of part of this estate. A paper called "A Rental," &c. was, under the 23d section of the Statute, prepared and issued by the Commissioners for the purpose of informing everybody what was to be sold, in which the existence and validity of the lease were distinctly recognised, and the proper notices were given in conformity with that rental. *E.* became the purchaser of part of the estate, and in the conveyance made under the 27th section, and duly executed by the Commissioners, there was, by mistake, introduced a description, accompanied by a map, also erroneously drawn, of the land conveyed, which was the land actually held under the lease to *R.*, but that lease itself was not mentioned. In ejectment by *E.* against *R.* for this land :

Held that evidence to impeach the conveyance was not properly admitted ; that the question, founded on that evidence, whether *E.* had purchased subject to the lease to *R.* was improperly submitted to the jury ; that under the 27th section, the land must be taken to have passed by the conveyance, subject only to such leases as were "expressed therein" ; and that the 49th section rendered the conveyance conclusive as to all acts, consents, &c. required, having been duly performed and given.

THIS was a proceeding in Error on a judgment of the Court of Exchequer Chamber in *Ireland*.

In 1822, *F. Hamilton* being seised in fee of the townlands of *Muckland*, in the county of *Kildare*, demised the same for three lives to *John Lucas Wilton*, his heirs and assigns. *Wilton*, by deed, dated 8 *July* 1828, assigned this

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g them as "that part of the running in a stripe or belt of *Muckland*, and which the bog conveyed to the said Commissioners, by deed dated 29th July 1853, for that part of the running in a stripe or belt along of *Muckland*." This defence was for an order of Mr. Justice *Torrens*, of the Bog of *Muckland*, containing, by deed, as formerly in the possession of the said *John Rorke*, in the possession of *John Rorke*, in the summons and plaint sought to be made the Bog of *Allen* and *Clunagh*." On for trial at *Athy*, in the county of *Wick*, Chief Justice *Lefroy*, when *Errington* of 29 July 1853, in which the land was part of the Bog of *Allen* and *Clunagh*, in the county of *Carbery* and county of *Kildare*, 3 r. 24 p., as described by a map annexed to the appurtenances, to hold to *Errington* for ever, subject to the right of tithes thereinafter named of the lands of *Dun-
 n*, *Clunagh*, and part of *Muckland*, as set forth in the schedule annexed to this conveyance." The map was deposed to by Mr. *Taylor*, a witness. On the part of *Rorke* there was put in evidence to *Wilton*, with the assignment by him in evidence was admitted after objection was made that the lease was not mentioned in the deed of the 29th July 1853, and that the lands were without any statement that they were subject to lease and assignment. The admissibility of the evidence made the subject of exception (No. 1).

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A witness was then produced to prove that the lands sought to be recovered were those demised by the lease of 1822, which was still a subsisting lease; that *Wilton* was in possession of these lands when he assigned them to *Rorke*; that *Rorke* had been in possession ever since; and that the lands were always known as "*Muckland*" and not as "*Allen and Clunagh*." The printed paper called "Rental and Particulars" was then offered in evidence. This paper advertised for sale in the Incumbered Estates Court the estate of *F. Hamilton* in five lots, and was tendered for the purpose of showing that the Commissioners had declared that they had "ascertained the tenancy of *Rorke*," and advertised the sale "subject to said tenancy," and that *Rorke's* lands were in the proceedings in the Incumbered Estates Court called "*Muckland*." The paper was endorsed by *Errington's* attorney, and, as it was contended, was thereby admitted to be the "Rental and Particulars" under which *Errington* purchased the land afterwards conveyed by the deed of *July* 1853. The admissibility of this paper was objected to by the Plaintiff's counsel on the ground that it was "anterior to the conveyance." The *Lord Chief Justice* admitted it, and an exception (No. 2) was thereon tendered. The notice of *May* 1851 was then given in evidence, the object being to enable *Rorke* to insist that as the Commissioners had thereby declared the validity of *Rorke's* lease they could not afterwards sell the lands discharged of it. The order of Commissioner *Longfield*, of *May* 1853, for exchanging a portion of the bog originally sold to *Errington* for an equal portion of the Bog of *Clunagh* next adjoining the lot sold to him was proved, the object of this evidence being to show that the order had not been complied with, but that the boundary of *Clunagh* had been passed over, and a portion of *Muckland* given instead. The maps connected with the lease of 1822 were

also produced, and their correctness proved. Evidence was then given that the distinction between the two lands was perfectly well known. The *Lord Chief Justice* told the jurymen that if they believed the lands sought to be recovered were those demised by the lease of 1822, and that *Errington* purchased subject to that lease, they must find for the Defendant, as to which direction the counsel for the Plaintiff insisted that it ought to have been, "that if the jurymen believed the premises sought to be recovered were within the ambit of the map depicted on the margin of the conveyance of the 29th *July* 1853, they must find a verdict for *Errington*." As his Lordship refused so to direct the jury an exception (No. 3) was tendered to his direction.

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The exceptions came on for argument in the Court of Queen's Bench, and were all three disallowed. They were taken on error into the Exchequer Chamber, where, in *April* 1857, the judgment of the Court below was reversed (*a*). The present suggestion in error was then filed.

The judges were summoned, and Mr. Justice *Willes*, Mr. Baron *Bramwell*, Mr. Baron *Watson*, Mr. Justice *Byles*, and Mr. Justice *Hill* attended.

Mr. *Johnson* (of the *Irish* bar) and Mr. *Holl* for the Appellant :

There has been a mistake here, and it arose from the omission, when the lots were re-arranged for the convenience of the purchaser, to alter the schedules in accordance with the fact. The conveyance has adopted that mistake, and the question in substance is, whether, because it has

(*a*) 6 Ir. Com. Law Cas. 279.

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done so, the mistake is to be perpetuated, and a very great hardship and injustice inflicted on the Appellant. It is submitted that this mistake must be rectified. A conveyance made under the statute is not necessarily incapable of being impeached for inaccuracy. The 51st of the statute now under consideration expressly recognises that the Commissioners' decision may be reviewed.

That statute is the 12 & 13 *Vic.*, c. 77. The Commissioners appointed under it have no authority to sell estates which are not incumbered. [Lord *Brougham*: But the contention on the other side is, that by section 49 of the statute a conveyance executed by the Commissioners is conclusive evidence that all that has been done has been rightly done.] [The *Lord Chancellor*: And if the freehold passes, it does so without any incumbrance, except such as may be "expressed" in the conveyance.] It is submitted that nothing has been finally concluded here, and the second proposition of the Appellant is, that his interest in the lease of 9th *Murch*, 1822, formed no part of the encumbered estate of inheritance which was sold; that it was a distinct estate, and that there was, by the declaration of the Commissioners themselves, an adjudication in favour of it which was final as against them, and which they had no power afterwards to disregard. Thirdly, the Appellant contends, that the conveyance having been made under such circumstances, it cannot be treated as a valid execution of the power given by the statute, and therefore is not conclusive, confers no legal right on the Respondent as to the *locus in quo*, and has been properly allowed to be impeached by the evidence.

The Incumbered Estates Court is a Court of limited or special jurisdiction, and no such Court can by any act of its own make a jurisdiction for itself, *Thompson v. Ing-*

ham (b). [Lord *Brougham*: Your argument amounts to this: that if there is a mortgage on *Blackacre*, but from that mortgage is excepted a small portion of *Blackacre*, the Act, and the powers under it would not apply to that portion, for that it is not incumbered property?] Certainly. The authority being very limited and special must be exactly followed, *Collins v. Collins* (c), and the decision of such a tribunal may be examined in a superior Court, to see whether it is correctly founded, *Bunbury v. Fuller* (d). This case cannot be assimilated to that of *Ellis v. Segrave* (e), where it was held that the decision of the trustees of forfeited estates in *Ireland* was final, for that case proceeded on facts which gave complete jurisdiction to the trustees; not so here; for here there was a lease, its existence was known, and the statute itself directs (section 23), that "the sale shall be made subject to the tenancies, leases," &c., as to the existence of which the Commissioners are, first of all, to inquire. [Lord *Cranworth*: The section excludes some. The words are, "save such as with consent as hereinafter mentioned shall be included in such sale."] Here no consent was, in fact, given. The Commissioners had inquired; they knew of the lease; they recognised it as valid, and this lease was not incumbered. Now, *Annesley v. Dixon* (f) had declared that the Trustees for Forfeited Estates in *Ireland* could not give themselves jurisdiction by declaring an estate forfeited; and where they had done so erroneously, the estate was restored to the owner. That case is decisive of the present, and the doctrine there laid down has been acted

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(b) 14 Q. B. Rep. 710.

Macarty v. Bayly, id. 218.

(c) 26 Beav. 306.

(f) Holt, 372. 377; 7 Bro.

(d) 9 Exc. Rep. 111. 140.

Parl. Cas. 213, Toml. Edit.

(e) 7 Bro. P. C. 331. See also

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on in modern times in this House, *Shand v. Henderson* (g), where it was determined that if a particular jurisdiction was created, a complaining party was not limited to seeking his remedy under that jurisdiction, unless every act necessary to found it had occurred as prescribed. The Commissioners in this case had no more power to declare this lease incumbered, or to treat it, contrary to the fact, as being so, than the Trustees under the Forfeited Estates Act had power to declare the estate forfeited in the case of *Annesley v. Dixon*. The 16th and 17th sections show that an estate must be actually incumbered in order to give them jurisdiction, and the 19th section provides, that a sale shall not be authorised, nor the land “deemed subject to an incumbrance when the same shall not affect the inheritance.” The 21st section gives the Commissioners power, after “notices and a hearing,” to direct a sale, and the 23d expressly directs an inquiry as to tenancies and notices to be given. One great purpose of the statute, therefore, was to protect *bonâ fide* existing interests. Yet that object will be utterly defeated if this conveyance is to be treated as conclusive.

Under these circumstances, therefore, the conveyance, not having in terms complied with all that is directed in the preceding sections, is not conclusive under the 49th section. It is not so even in form, for all the forms given in the statute have not been strictly followed; and it cannot be said that any form prescribed by a statute like this is immaterial. But besides that, *Muckland* is not mentioned in it, and cannot therefore be affected by it, *Youde v. Jones* (h). Suppose that the conveyance, instead of being executed by two Commissioners, had been executed by one only, it would

(g) 2 Dow. 519.

(h) 13 Mee. & Wels. 534.

ve been void, and so it must be if any requisite stated in the Act is disregarded. The facts to show that all that the statute requires has not been done may be adduced in evidence. The *Lord Chief Justice* was right, therefore, in admitting the evidence impeaching the conveyance, or rather shewing that it could not apply to the land of the defendant under this lease, and he was right too in the direction which he gave to the jury upon that evidence.

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Mr. Serjeant *Shee* and Mr. *Badeley* appeared for the Defendants in Error, but were not called on.

The *Lord Chancellor* moved that the following questions should be put to the judges: "First, did the lands for which the ejectment was brought pass by the conveyance to the Defendant in Error. Second, was the evidence which was admitted by the *Lord Chief Justice*, and to which the first and second objections relate, admissible for the purpose of controlling the operation of the conveyance? Third, was the direction of the *Lord Chief Justice* on the point accepted to correct in point of law.

The Judges retired for about an hour, and then—

Mr. Justice *Willes*, on behalf of all their Lordships, delivered the following opinion:—My Lords, as to the first question, the Judges are of opinion that the lands for which the ejectment was brought did pass by the conveyance. As to the second, we are of opinion that the evidence was not admissible for the purpose of controlling the conveyance. And, as to the third, we are of opinion that the direction of the *Lord Chief Justice* was not correct in point of law.

Mr. Justice
WILLES.

The words of the conveyance, taken in connexion with the map, which is referred to, and made part of it, are sufficient to describe the land in question, and to express an intention to convey it. The omission to describe the land

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by the name of "*Muckland*," and even the description of it, as within another denomination, amount at most to an erroneous additional description of that which is identified beyond doubt by reference to the map, *constat de corpore*.

As to the other and more important questions, they turn upon the construction of the 12 & 13 *Vict.* c. 77, ss. 15, 23, 24, 27, 36, 39, and 51. Construing these sections together, we entertain no doubt that it was the intention of the Legislature, with respect to the conveyance of lands brought into the Incumbered Estates Court, and the leases existing or claimed to exist thereof, that unless the Court should convey subject to the leases generally, or subject to the particular lease or particular leases mentioned in the schedule (of which the lease in question should be one), such lease is, by the operation of the Act, expunged from the title in favour of the purchaser. The 15th section makes the Commissioners a Court of Record, and gives them the jurisdiction of a Court of Equity, for, *inter alia*, the "investigation of title, and for ascertaining and allowing incumbrances and charges, and the amounts due thereon, and settling the priority of such charges and incumbrances respectively; and the rights of owners and others, and generally for ascertaining and declaring and allowing the rights of all persons in any land or lease in respect of which any application is made." The 23d section, in effect, gives power to convey generally without mention of leases, or subject to the leases to be referred to in the conveyance or a schedule thereto. By the 24th section the execution of the conveyance by two Commissioners is to be sufficient; and "such" conveyance (that is the conveyance executed by two Commissioners) is to mention the tenancy, &c. (if any) subject to which the sale is made; and that section refers to a form

of conveyance in the schedule, which form does not provide for specifying leases where the Commissioners hold them not to be binding, or where, by reason of the consent of the tenants, the fee is sold free thereof.

The 27th section, in express terms, enacts, "that every such conveyance, executed as aforesaid, shall pass the fee-simple free of all tenancies, except those expressed therein." Upon this section it has been argued that the word "such" must mean such conveyance as is made subject to leases generally, or such conveyance as specifies all the existing leases in a schedule. This however, as was observed by the *Lord Chancellor*, would make the section inoperative: for if the conveyance were made subject to all leases, or if all existing leases were specified therein, there would be nothing for the section to operate upon.

By the 36th section, even the lessee of an unincumbered lease affecting land, of which the freehold is in the Court, may apply to have it sold, and, upon such application, with the consent mentioned in the 23d section, the Commissioners may sell such leases and the fee-simple. Then comes the 49th section, which creates a presumption, *juris et de jure*, in favour of the absolute validity of the conveyance, if it was one which the Commissioners could, under any circumstances, properly have made; for that section enacts, *inter alia*, that "conveyances executed as required by this Act, &c. shall, for all purposes, be conclusive evidence that every proceeding, consent," &c. has been duly taken and given.

These words seem to us final, for we do not see how, in the absence of any evidence that the land in question was not within the scope of the petition, or in the Court for sale, the question so much argued at the Bar as to jurisdiction can be raised. In the absence of such evidence, it must be assumed that the fee simple was within the juris-

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diction of the Commissioners; and, if so, even the “consent” of the lessees is, if necessary, to be absolutely presumed in favour of the conveyance.

As to the argument, that the order for sale, with the rental, amounts to an adjudication of the validity of the lease, and that so the conveyance is void, there are many answers to that. First, it is not an adjudication, but merely a proceeding towards one. Secondly, if it was, the Commissioners have power to vary it under section 51. And, lastly, such adjudication, if it existed, would not preclude a conveyance, upon the application and by the consent of the tenant, which application and consent, as we have observed, must, if necessary, be presumed.

We, therefore, answer the first question in the affirmative, and the second and last questions in the negative.

The Lord Chancellor (Lord Campbell):

My Lords, I have first, in the name of your Lordships, to thank my Lords, the Queen’s Justices, for having so promptly favoured your Lordships with their opinion upon this very important question. And that opinion of the learned Judges being a unanimous one, and being, I believe, acquiesced in by all the Members of your Lordships’ House now present, I think that we ought, without delay, to pronounce judgment in this case.

My Lords, it is a case of great hardship on the part of the Plaintiff in Error, but this High Court and all other Courts must take care that hardship does not produce bad law. I think that it would be a very erroneous and a very mischievous decision, and a decision that would produce most lamentable effects if your Lordships were to reverse the judgment of the Court of Exchequer Chamber in *Ireland*.

My Lords, I formed a strong impression upon reading this case that that judgment was right; and, after the





E SOMERSET BUTLER - *Plaintiff in Error.*

Y EDMUND VISCOUNT

INTGARRET - - *Defendant in Error.*

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July 6, 7.

*Family
Reputation.
Evidence.
Letters.
Lis Mota.
Post Mark.*

ATION between a connexion of a family and some of the
s of the family on the subject of a marriage supposed to
en place in that family, cannot be given in evidence with-
ious proof that the persons with whom the conversation
ce are dead.

rsy in a family, though not at that moment the subject of
onstitutes a *lis* sufficient to render inadmissible in evidence
written on that subject by one of the members of the
and addressed to another member of it.

B., and *P. B.* were, in 1816 (in this order of succession),
xtant heirs of a person who was then childless. In that
B. wrote to *P. B.* a letter, stating circumstances respecting
ed marriage of *H. B.* in 1811, which, if true, would have
t of handing over the succession to *P. B.*'s children. The
lder of the property did not die till 1846: HELD, in an
nt afterwards brought by the children of *P. B.*, that this
as not admissible.

her the date a letter bears is *primâ facie* its true date?

in *v. Weston* and *Potez v. Glossop* commented on.



was a proceeding in error brought on a judgment
Exchequer Chamber in *Ireland* in an action of
t, brought by *P. S. Butler*, to recover from the
nt, Lord *Mountgarret*, certain lands in the county
nny, which had been the property of the late Earl
nny. The Earl, who had inherited the title of
t *Mountgarret*, but had been created Earl of *Kil-*
ad three brothers, *Somerset*, *Henry*, and *Pierce*.
t died in 1826 without issue. *Henry* died in
aving the Defendant, his eldest son by his marriage
iss *Harrison*. *Pierce* died in *June* 1846, leaving

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the Plaintiff, his eldest son. The Earl died in *July* 1846 without issue. The earldom thereon became extinct, and *Henry Edmund Butler* (the Defendant), the son of *Henry*, was admitted to the viscounty, and entered into possession of the entailed estates. In *July* 1853 the Plaintiff brought against him an action of ejectment, on the ground that he was not the legitimate son of *Henry*, for that *Henry*, before his marriage with Miss *Harrison*, which was formally celebrated on the 3d *September* 1811, in the parish church of *Brighton*, had contracted *per verba de præsenti* a marriage at *Edinburgh* with a young widow named *Colebrooke*. The action was first tried at the summer assizes for the county of *Kilkenny* in 1854, when a verdict was found for the Plaintiff; but the Court of Exchequer set aside this verdict, and ordered a new trial, which came on before Mr. Serjeant *Berwick* at the spring assizes for *Kilkenny* in 1855, when a verdict was found for the Defendant. Exceptions were taken to the ruling of the learned Judge on certain points of evidence, and these exceptions were argued in the Exchequer Chamber, where judgment was given for the Defendants.

The evidence on the subject of the alleged *Scotch* marriage, as given by Mrs. *Colebrooke's* confidential servant, *Sarah Stride*, was in substance this: That at the end of *March* or beginning of *April* 1811, *Henry Butler* came to the house where Mrs. *Colebrooke* (with whom he had previously had illicit connexion) was then living at *Edinburgh*, and insisted on being admitted, was very violent and threatening, and declared that Mrs. *Colebrooke* was his wife; that the house was his house, and that nobody should dare to keep him out; he scaled the wall at the back of the house, and entered. Mrs. *Colebrooke* met him at the top of the kitchen stairs in the hall. She had been up to that moment in bed with a Mr. *Taaffe*. She came down

great confusion, *Taaffe* having been safely locked in the bedroom. She and *Butler* went into the housekeeper's room, where they remained ten minutes, or a quarter of an hour, and *Taaffe*, whom the witness *Stride* had in the meantime let out of the bedroom, was put into the drawing room. Mrs. *Colebrooke* and *Butler* shortly afterwards went up to her bedroom, and after they had been there some little time, she rang the bell, which *Stride* answered, and she told *Stride* to call up the other servants. *Stride* called up *William Johnston*, the footman, and *Margaret Johnston*, his sister, the nursemaid; when the three servants were in the room, "Mrs. *Colebrooke* said that Mr. *Butler* wished me to call us up, to witness that him and her were man and wife. They were standing side by side with their backs to the fire, joining hands. Mr. *Butler* merely nodded his head." The Plaintiff, farther to maintain the issue, produced the Dowager Marchioness of *Armonde*, who said she was a connexion of the *Mountgarret* family. She had heard of the marriage of *Henry Butler* with Miss *Harrison*. She was asked whether before she heard of that marriage she had heard from some members of the *Butler* family that he had contracted a marriage in *Scotland* with a Mrs. *Colebrooke*. The question was objected to (a), and the learned Judge allowed the objection. This formed the ground of the first exception. Proof was then given that a letter, dated 26th September 1816, signed *Somerset Butler*, and addressed *Pierce Butler*, was in *Somerset Butler's* handwriting, and the Plaintiff's counsel proposed to read this letter, with a view of laying before the jury two particular passages

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(a) The objection, though not so stated in the Bill of Exceptions, is said to have been this: that it was not shown that the members of the family with whom the conversation to be proved took place, were dead.

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in it (*b*). The counsel for the Defendant objected that the first of the two passages was something written after a certain matter had become the subject of controversy in the family, and that the letter must therefore be treated as a statement made *post litem motam*; and that the second of these passages was subject to the same objection, and was farther objectionable as being the statement of the contents of a written document. The learned Judge allowed the objection to each of the passages referred to, and the doing so formed the subject of the second and third exceptions.

The Defendant's counsel produced one *Henry Preston*, an agent for the Post Office, who proved the *Moffatt* Post-office mark on a letter "29th *March* 1811." The letter itself was dated 26th *March* 1811. This was a letter which purported to come from Mrs. *Colebrooke*, and was

(*b*) The letter was in the following terms. The two passages are printed in *italics* :—"Dear *Pierce* ; I think it just and fair to tell you all I know about *Henry* and Mrs. *Colebrooke*. About 1810 I dined with them in *Cadogan-place* ; she was sitting on his knee part of the evening, and I left them, I thought of course, to sleep together. I heard afterwards they were gone to *Scotland*. About 1811 I met him at the *Bedford* Coffee House, much agitated ; he said he was in a scrape ; that Mrs. C., in *Scotland*, had called up several of her servants as witnesses, and that they had taken each other as man and wife before them ; that since she had declined acknowledging him. I told him she was his wife, and that he would be arrested for her debts, and advised him to advertise that he would not pay any future debts ; he seemed to agree with me : he showed me a letter he had written her, calling her his wife, and the mother of his children. I laughed, as he previously told me one child was dead, and the other a miscarriage. He also showed me a few lines from her, abusing him, but not signed : after this, he told me she had come to town ; they had passed the night together, and had again quarrelled. Mrs. *Harrison*, at *Brighton*, complaining of his and her daughter's conduct, told me Mrs. *Colebrooke* had written her a letter, saying if she gave her 13,000 *l.*, she would give up her claim to *Henry*. Mr. *Forth*, of *Brighton*, told me she had mentioned much the same thing to him. This is all I know of the business.—I am, dear *Pierce*, yours affectionately, *S. Butler*. *Cheltenham*, September 26th, 1816."

addressed to a third person. The Plaintiff's counsel objected that this letter (the object of producing which, was to throw doubt on the alleged date of the supposed *Scotch* marriage) was not admissible for that purpose, for that the post-mark was no evidence of the place in which the writer was when the letter was written. The learned Judge held that the letter was admissible in evidence, on the issue in the cause, and this constituted the matter of the fourth exception. The Defendant's counsel, with the view of showing that after the supposed *Scotch* marriage Mrs. *Colebrooke* did not treat it as of any validity, then proposed to read in evidence a letter of Mrs. *Colebrooke*, dated 13th *May* 1811, and signed by her in that name. This letter was objected to by the Plaintiff's counsel, but was held to be admissible as evidence on the issue, and this formed the subject of the fifth exception. In his charge to the jury, the learned Judge read and commented on the letters of Mrs. *Colebrooke* which he had admitted in evidence. The Plaintiff's counsel required that they should be withdrawn from the consideration of the jury, but the learned Judge refused to withdraw them, and this formed the subject of the sixth exception.

The Court of Exchequer overruled all the exceptions, and gave judgment for the Defendant. The case was then taken to the Exchequer Chamber, where this judgment was affirmed. The Plaintiff then brought the case on error to this House.

Sir *H. Cairns*, for the Plaintiff in Error :

The question whether there had or had not been a communication between two members of a family on a supposed marriage in that family was admissible. It is not to be excluded on the ground that there was a domestic dispute, whether that particular fact did or not exist. There

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was not a *lis mota* at that time. Put this in the strongest way. Suppose a dispute between husband and wife whether a particular child was born before or after a given event, and suppose they had made different entries on the subject, that would not prevent each entry from being admissible. This was a mere family discussion, as to which one brother was giving information to another. No *lis* did or could exist then. The Earl was alive, and *Somerset Butler*, who wrote the letter, was the eldest of the three younger brothers. In *Freeman v. Phillips* (c), the depositions of freeholders, made many years before in a suit relating to the customs of the manor, were admitted in a proceeding for a false return to a mandamus as to the customs of the manor. In that case there was a *lis mota*. [The *Lord Chancellor* (Lord Campbell): The *ratio decidendi* there was, that it was not the same question. Lord *Chelmsford*: The *lis* here was, at the date of the letter, deemed by all the parties to be inevitable. All the members of the family who were in a sound state of mind had their attention engaged on the subject.] But the mere existence of an interest which may probably become the subject of a *lis*, does not prevent family statements from being admissible. In the recent case of *Partington v. Rennells* (d), a widow lady having no children, advertised for members of her family. She received numerous letters from *America*. She died intestate, never having made up her mind as to who were her relatives. The declarations made by members of the family in *America*, as to the state of the family, were received in opposition to the argument that they were made by persons having a deep interest in making them. [Lord *Chelmsford* intimated a doubt whether any such declarations had been admitted,

(c) 4 Maule & S. 486. (d) MS.

except those which she in her lifetime had pronounced to be correct.] The true principle was stated by Lord *Eldon*, in *Whitelock v. Baker* (e), namely, that the traditions of a family, to be receivable in evidence, must be made by persons having such connexion with those to whom they related ; that it was likely, from their domestic habits and connexions, that they were speaking the truth, and that they could not be mistaken. These conditions were perfectly fulfilled here. In this case the writer was connected with the family, was likely to be well informed, and was thoroughly impartial, and no contest, such as will render a letter of this kind inadmissible, had arisen when this letter was written.

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Then as to the objection that the statement of the contents of *Henry Butler's* letter was the statement of the contents of a written document, that objection cannot properly be taken here. Two men, *Somerset Butler* and *Henry Butler*, have met together ; they are discussing a particular event ; the same thing which has been asserted by *Henry Butler*, as to himself, is asserted by him in writing : the repetition of that statement made at that very time may be given in evidence, as well as the verbal declaration. Take the case which most resembles it, of a public meeting, speeches and banners. The banners cannot be produced, but evidence of the words upon them may be given by those who saw them at the meeting. [Lord *Wensleydale* : That is on account of the inconvenience, perhaps the impossibility, of procuring the banners.] The persons making the speeches are supposed to be repeating what is put upon the banners, and both are capable of being proved in evidence.

On the second and third exceptions the judgment of

(e) 13 Ves. 514.

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the Court below cannot be supported. The Plaintiff in Error does not present any arguments as to the others.

Mr. *Butt*, of the *Irish* Bar, and Mr. *Peter Barlow*, who appeared for the Defendant in Error, were not called on.

The *Lord Chancellor* said that a great many questions had been raised, but there was only one on which he thought any difficulty could possibly arise, and that was “whether the letter of the 26th *September* 1816, from *Somerset Butler* to *Pierce Butler*, was properly rejected by the Judge at the trial, on the ground of *lis mota*.” His Lordship moved that that question should be put to the Judges: agreed to.

Mr. Justice *Willes*, on the part of the Judges, asked that they might retire to consider the question. After a short absence, they returned, and Mr. Justice *Willes* then delivered on their behalf the following opinion:—

In answer to the question which your Lordships have proposed to the Judges, we are of opinion that the letter from *Somerset Butler* to *Pierce Butler* was properly rejected by the Judge, on the ground of *lis mota*.

The letter was tendered by the Plaintiff to prove a marriage between *Henry Butler* and Mrs. *Colebrooke* in 1811. It had been given in evidence for the Plaintiff, upon the trial, that after the period at which the alleged marriage was said to have taken place, each of the parties had acted inconsistently with the fact of the marriage, and that, in fact, they had respectively married again, Mrs. *Colebrooke* a Mr. *Tuaffe*, and *Henry Butler* a Miss *Harrison*; and it appeared by the letter itself that a dispute had, before the alleged statements of *Henry Butler*, arisen between

Mrs. *Colebrooke* and him as to whether they were man and wife. That was a controversy capable of being litigated, and upon which the parties interested took opposite sides. If a suit for justification of marriage, or for restitution of conjugal rights, had followed, the *lis* would surely have dated at least from the time when the parties had respectively assumed a hostile attitude; and by the law of England differing in this respect from the civil law, a suit is not necessary to constitute *lis*. The controversy was one of a nature likely to bias the mind of *Henry Butler*; and upon reading this letter, it is obvious that it had put him into a state of very great disquietude upon the subject. Farther, it was a controversy upon the very point, to prove which, the letter was tendered. We therefore answer your Lordships' question in the affirmative, that the letter was properly rejected.

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The Lord Chancellor :

My Lords, after this clear and conclusive opinion unanimously given to your Lordships by the learned Judges, I think we may at once dispose of this cause. There were four exceptions taken to the ruling of the learned Judge at the trial. With regard to the first and fourth, we thought that it would not be respectful to the Judges to put any question to them as to those exceptions, because we were all of opinion that it was quite clear that the ruling of the learned Judge upon those points so excepted to, was unexceptionable; and indeed the learned counsel who has just addressed us with his usual ability, and with a candour that belongs to, and ought to be exhibited by, a gentleman of his high station at the bar, admits that upon the other exceptions he cannot now rely. With regard to the first, it is quite clear that, without proving that the members of the family whose declarations were to be

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given in evidence are dead, their declarations are inadmissible. With regard to the fourth, it is equally clear that this letter, with the post-mark upon it, and with the particular date upon it, written by Mrs. *Colebrooke*, was admissible evidence, for the purpose of showing that she was at *Moffatt* at that time; it is by no means conclusive evidence; but there is other evidence by which it was strongly corroborated.

We have had a most learned and able argument in support of the second and third exceptions; upon these the question resolves itself into a single point, whether there was *lis mota* before the letter in question was written. There are other objections that might be made to particular parts of the letter, but upon those it is not necessary to give any opinion, because the objection on the ground of *lis mota*, according to the unanimous opinion of the Judges, decisively disposes of the second and third exceptions.

Now, my Lords, I must say that I most heartily concur in the opinion that the Judges have pronounced. There was in my mind clearly a controversy existing upon the question before the letter was written. Now, what is the question? The question is this, whether there had been a marriage in *Scotland* between *Henry Butler* and Mrs. *Colebrooke*. It was to prove that there had been such a marriage that the letter was proposed to be given in evidence. Had there not been a controversy upon that subject before the letter was written? And at the time when the letter was written, did it not subsist?

It was for the Judge to say whether the letter was admissible or inadmissible; and in order to come to a right conclusion upon that question, he was to consider whether there was evidence of *lis mota*, independently of the letter. And, moreover, he was bound to look at the letter, and to

read it, and to see from its contents whether it was admissible or not. Without entering minutely into the evidence, I think that there was, independently of the letter, evidence to show that before the letter was written there had been a controversy in the *Butler* family as to whether there had been this *Scotch* marriage or not. But the letter itself, I think, is quite conclusive on the subject, because the whole scope of it shows that there had been a controversy. And it was in my opinion a controversy which was likely to create a bias one way or the other upon the mind of every member of the family. The Earl of *Kilkenny* was still alive, and the present Lord *Mountgarret* was not then entitled to claim either the title or the estates, nor was the present Plaintiff in a position to make the claim which he now makes. But, looking at the state of the family, it was a question which must inevitably arise, because if *Henry Butler* had contracted a valid marriage before he married the mother of the present Lord *Mountgarret*, then that marriage between him and the mother of Lord *Mountgarret* was void, and consequently Lord *Mountgarret* was illegitimate, and the next heir would be entitled to succeed. That was known to the different members of the family. It was a matter of great interest to them, as to which no doubt each might take one side or another: and, according to the established rules of the law of *England*, if there is such a controversy, it is supposed to create a bias upon the minds of those who make statements upon the subject, and it renders hearsay evidence upon the subject inadmissible. I think there is no doubt at all, whether we look at the evidence beyond the letter, or at the letter itself, that there had been this controversy in the family. The letter conclusively shows that there had been a controversy in the family respecting the validity of this *Scotch* marriage, and that is the subject of

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the *lis* that now exists, because the *lis* that now exists is, Was there such a marriage or not? That controversy had arisen before the letter was written. If it had arisen before the letter was written, then the letter was inadmissible. Therefore, concurring entirely in opinion with the learned Judge who has assisted us by so clearly expressing the opinion of himself and his brethren upon this subject, I must advise your Lordships to affirm the judgment of the Court below.

Lord *Brougham* :

My Lords, I entirely agree with my noble and learned friend, and with the learned Judges, in the opinion which they have formed ; indeed, the statement of the argument by Mr. Baron *Greene* is conclusive of itself, although I think it does not go quite far enough at the beginning. He says the letter proves a *lis mota* anterior to its date of 1816. It proves a great deal more than that ; it proves a *lis*, or at least that which amounts to a controversy, in the year 1811, at the time at which this supposed declaration was made. If the letter had been produced and tendered, and there had been nothing else in the cause to lead the learned Judge's mind to the conclusion of the existence of *lis mota* at the time, and if he had therefore admitted the letter, the moment that letter was read, it would so clearly have proved that there was *lis mota* at the time, that it must at once have been struck out of the evidence.

Lord *Cranworth* :

My Lords, I take entirely the same view of this case as my noble and learned friends. It seemed to be suggested at one time, in the course of the argument, that the learned Judge who tried this case would not have been justified in

rejecting the letter, unless previously to its being tendered in evidence it appeared that it was written at the time when there was a *lis mota*. That I take to be an entire mistake. If the letter itself shows that at that time there was a *lis mota*, then the letter is inadmissible. Now, upon the question whether this letter does show that or not, it appears to me, that not only it does show that, but it shows nothing else. All that the letter shows is, that there was a controversy in the *Butler* family in the year 1816, whether or not a valid marriage had taken place; that one brother insisted upon certain facts, which we must understand to be the only facts that would give rise to the notion of there having been a valid marriage, and contended that those facts constituted a valid marriage, and that the other disputed that, and said that they did not constitute a valid marriage. It appears to me, that to admit that letter, would be directly at variance with the principle upon which this sort of evidence is received, and which is stated by Lord *Eldon* to be, that such declarations are admitted upon the ground that they are the natural effusions of parties who must know the truth (now one of these parties knew nothing about it, except what he knew from others), “upon occasions when their minds stand in an even position without any temptation to exceed or to fall short of the truth.” As to every one of these propositions, the case here would fail. Therefore I entirely concur in the opinion, that there was a *lis mota*, which properly led the Judges to exclude this piece of evidence.

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Lord *Wensleydale* :

My Lords, I entirely concur in the opinions which have been given by my noble and learned friends. There is not the least doubt upon the first exception, and it was therefore thought unnecessary to submit it to the learned Judges.

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The declarations proposed to be given in evidence by the Dowager Marchioness of *Ormonde* were not confined to declarations of deceased members of the family. That is at once an answer to that piece of evidence; no farther answer need be given.

With respect to the second exception we thought it necessary to put the question to the learned Judges, whether the declaration of *Somerset Butler* was made after *lis mota*. I concur entirely in the judgment of Mr. Baron *Greene*, in which he states, in a very clear, convincing, and satisfactory manner, his grounds for considering that *lis mota* had then arisen, and I entertain not the least doubt that there was ample evidence to justify the Judge in coming to the conclusion that *lis mota*, in the sense required to render this declaration inadmissible, existed at the time.

One observation I wish to make upon another part of the case to which my noble and learned friend has adverted, that is, as to the admission of the letter from *Moffatt*. It is the Post-office stamp which makes that letter admissible; but I am not prepared to draw the same conclusion as some of the Irish Judges, who say that it is quite settled that the date in the letter is *primâ facie* evidence that it was signed the day it bears date. I am still at a loss to discover upon what legal principle it can be considered admissible, unless it is subscribed and written by a party to the cause, or by one through whom a party to the cause claims interest. It is perfectly true that, under a decision pronounced by Mr. Justice *Bosanquet*, in the Common Pleas (*f*), to which I adverted in the course of the argument, the practice has been to treat the date in a letter as its true date. This matter was under consideration in the Court of Exchequer at the time when my noble and learned friend opposite was a member of that Court, in the

(*f*) *Anderson v. Weston*, 6 Bing. N. C. 300; 8 Scott, 583.

Potez v. Glossop (g), where it was laid down by the that we were compelled, by the many cases which n decided, to hold the date to be *primâ facie* evi- s to the time of writing the letter ; but we intimated ion very strongly—at least I did, and I believe my ad learned friend concurred with me—that it would er to take the opinion of a superior Court by a Bill ptions, if that point should ever become material. ve that that case has been followed in one or two at are referred to in the note of that case of *Potez op.* I merely make that observation in order that ot be considered as acquiescing in the opinion of a Judges, who consider that point as finally settled. : finally settled.

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rd *Chelmsford*:

ords, I concur entirely with my noble and learned who have preceded me. I should not say a word e subject of the first exception, if it were not for that Mr. *Taylor*, in his excellent work upon Evi- b), has stated this case as an authority, that the Error in *Ireland* had rejected this evidence upon nd that it had not been limited to statements made used relatives. Now, I observe, upon looking into ions of the Judges, that it was only Baron *Greene* tinctly made that objection to the evidence. The dges went upon totally different grounds. But the n being in this particular form, which merely states : Marchioness of *Ormonde* had heard from some of the *Butler* family that he had contracted a e in *Scotland*, when the case is brought before rdships it is necessary for the parties to prove that

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exception in the express terms in which it is framed. Your Lordships intimated an opinion a few days ago in another case that it was necessary to hold parties strictly to the form of their exceptions. Now, this exception shows merely that the Judge refused to admit evidence of declarations of "some members of the family." It says no more. Before declarations of members of a family can be admitted, it is necessary to show that the parties by whom they are said to have been uttered are not in existence. That is a part of the evidence that must be produced by the party who is proposing to give proof of those declarations. It is the very foundation upon which those declarations are admitted, and, therefore, it is perfectly clear, that upon the frame of this exception the learned Judge's ruling was quite correct, that this evidence was inadmissible.

Then, it is only necessary to advert very shortly to the other exceptions which arose upon the letter from *Somerset Butler* to *Pierce Butler* in the year 1816. If it were at all necessary to go into that question, I should be disposed to adopt the opinion of Baron *Greene*, that the statements in that letter do not amount to a declaration of the fact of a marriage. But it is quite unnecessary to express any opinion upon that question, because I think the point upon which we have had the assistance of the learned Judges, and their opinion with regard to there having been a *lis mota* at the time the letter was written, is quite sufficient to dispose of that exception.

With respect to what is *lis mota*, I think I should be disposed to adopt the opinion which was expressed by Lord *St. Leonards* in a case before him, which is stated in Baron *Greene*'s judgment (*m*); he cites Lord *St. Leonards*' opinion, "That there is *lis* when conflicting statements are

made in the family" (which, perhaps, I should not be disposed to adopt to the full extent), "when it becomes, in short, a matter of discussion and controversy." The question here is, whether the letter itself does not show that the question of the marriage of Mr. *Henry Butler* with Mrs. *Colebrooke* was a subject of discussion and controversy in the family at the time when that declaration was made. It appears that the letter was written by Mr. *Somerset Butler* to Mr. *Pierce Butler*. The state of the family at that time was this: *Edmund Lord Kilkenney*, who was the eldest brother, was out of his mind, and had no issue. Mr. *Somerset Butler*, the next in succession, also had no issue. Mr. *Henry Butler*, the father of Lord *Mountgarret*, was the third brother, and Mr. *Pierce Butler* the fourth. This letter shows, that the three parties, *Somerset*, *Henry*, and *Pierce*, all of them had their minds directed to the subject of controversy, whether or not there had been a marriage between Mr. *Henry Butler* and Mrs. *Colebrooke*. And upon that depended, certainly in the year 1816, when, as I understand, Lord *Mountgarret* was born, the legitimacy of Lord *Mountgarret*: that question then was in controversy; and if Lord *Mountgarret* was illegitimate, then *Pierce Butler* would be entitled as next in succession to *Somerset*, who had no children. Under these circumstances, the very commencement of the letter shows that the parties were entering into a consideration of the state of the family with reference to the devolution of the honours and the estates which were involved in the discussion. The writer of the letter says, "I think it fair and just to tell you what I know of the circumstances connected with *Henry* and Mrs. *Colebrooke*." Then it was for the Judge to determine whether the letter itself, if there was no other evidence in the case, was not sufficient to establish the fact of there being a *lis mota*. The learned Judge was of that opinion, and rejected the evidence. I think the learned Judge was perfectly justified in so doing. I think

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the letter shows, in the strongest possible way, that there was a controversy existing, and, therefore, under these circumstances, I think the Judges of the Court of Exchequer Chamber were perfectly correct in overruling the exceptions; and I agree with my noble and learned friends, that the judgment ought to be for the Defendant in Error.
Judgment affirmed, with costs, and cause remitted.

Lords' Journals, 7th *July* 1859.

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Feb. 21, 22.
June 11, 15.
July 12.
Evidence.
Lease.
"Village."
"Mountain."
Question for
Jury or Judge.

THE RIGHT HON. LORD
WATERPARK - - - Plaintiff in Error.
JOSHUA R. FENNELL - - Defendant in Error.

WHERE parcels are described in old documents by words of a general nature, or of doubtful import, evidence of usage is proper to be received to show what they comprehend.

In 1704 was granted a lease of certain land in the county of Tipperary. The land was described in the demise, as "Lands, &c. in Scartany, containing 94 acres; Garryroan, containing 104 acres; and the village of Scartnaglowrane, and part of Whitechurch and Tincurry, containing 148 acres, with all rights;" there was then a reservation of mines and of the liberty of fishing and fowling, in favour of the lessor, and of "the liberty of commonage and cutting of turf on the mountain of Tincurry," in favour of certain specified tenants of the lessor. The lease was a renewable lease, and had been renewed twice since that period, in the same terms. The mountain was equally known by the name of the Mountain of Scartnaglowrane or of Tincurry. There was a collection of houses generally called the village of Scartnaglowrane on one of its sides. This village of Tincurry was at some little distance from it. The houses of the former village, and the arable land attached to them, had from time to time been increased in number and extent at the pleasure of the lessee and his under tenants, who regularly paid him rent for the same, and their cattle alone grazed on the mountain. The lessee had always sported on the mountain: HELD, that these facts had been properly admitted in evidence, to explain the words of the demise, and having been so, the Judge ought to have left to the Jury, and ought not to have decided of his own authority, the question whether the mountain of Scartnaglowrane passed under the demise.

TRESPASS. Declaration that the Defendant, on the 21st *August* 1854, broke in upon and entered lands of the Plaintiff, called the Mountain of *Scartnaglowrane* or *Tincurry*, and with dogs and guns hunted, &c.

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The Defendant pleaded that he was lawfully possessed of the said lands by virtue of a lease, dated 23 *February* 1853, for a term of 99 years or three lives, which lease was a renewal of an original lease, dated 26 *January* 1763, for a like term.

The lease mentioned in the plea was itself a renewal of a lease of 9th *January* 1704.

The following was the issue finally, by the consent of all parties, presented to the jury: "Whether, under the lease of 9 *January* 1704, and the several derivative and renewed leases under which Defendant's title is acquired, the Defendant is, as against the Plaintiff, entitled to the right of sporting over the lands in the plaint mentioned."

The case was tried before Mr. Justice *Moore*, at the sittings after Easter Term 1855. The affirmative of the issue being on the Defendant, he gave in evidence the lease of the 9th *January* 1704. This was a lease made by Sir *Richard Pyne*, then Lord Chief Justice of *Ireland*, to two persons of the name of *Sargent*. The demise was, "All that and those the lands, tenements, and hereditaments in *Scartany*, containing, by estimation, ninety-four acres; *Garryroan*, containing, by estimation, one hundred and four acres, and the village of *Scartnaglowrane* and part of *Whitechurch* and *Tincurry*, containing, by estimation, one hundred and forty-eight acres, as fully and amply as the same is demised and granted to the said Sir *Richard Pyne* by the corporation for making of hollow sword blades, now and of late in the occupation of *Thomas Travers*, gentleman, and his undertenants, lying and being in the parish of *Whitechurch*, barony of *Iffa* and *Offa*, and county of *Tipperary*, with all the rights, members,

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and appurtenances to the said lands and premises belonging, or in anywise appertaining (excepting and always reserving all mines, minerals, and all other royalties whatsoever, with liberty of ingress and egress to dig out and carry away the same with horses, carriages, and otherwise, with liberty of fishing, fowling, hunting, and hawking, which the said Sir *Richard Pyne* doth reserve to himself, his heirs and assigns), in and upon all and singular the premises, and also excepting always unto *Thomas Travers*, gentleman, and his assigns, tenants of the lands of *Burgess*, to *Richard* and *John Price*, gentlemen, and their assigns, tenants of the lands of *Ballyhohan*, *Ballygizzane* and *Tubrid*, to *Terence Daniel*, gentleman, and his assigns, tenants of the lands of *Russagh*, free liberty of commonage and cutting of turf on the mountain of *Tincurry*."

Witnesses were also examined for the Defendant, and they proved that the mountain was called *Scartnaglowrane* and also *Tincurry*; that the quantity of land under culture was less than 213 acres; that these lands were in the occupation of the Defendant's tenants, who paid him rent for the same, and their cattle, and theirs alone, grazed on the mountain; that there is a collection of houses, or a village, on the mountain; that the mail-coach road to *Cork* runs through part of *Scartnaglowrane*, and divides the houses from the mountain; that formerly there were not so many houses, or so much land under tillage; but that the houses were increased in number, and more land brought into cultivation, at the Defendant's pleasure; that there is turf all over the mountain; that the only turf bog is on the top of it; that it is on that bog that the tenants of Lord *Waterpark* cut and take turf; that the 148 acres demised by the lease of 1704 form part of the 212 now under cultivation; that the Defendant's father and himself had sported over the mountain of *Scartnaglowrane* without any hindrance.

The Defendant's counsel asked the learned Judge to

direct a verdict for the Defendant, on the ground that on the proper construction of the lease of 1704, the 1,700 acres of mountain land (of which the whole mountain consisted) did not pass to the lessee. The learned Judge, however, declined to do so, and the Plaintiff then produced evidence. The chief witness was the Plaintiff's agent, who had been his gamekeeper for ten years, who stated, that the whole mountain contained 1,700 acres; that he had paid income tax for the Plaintiff in respect of the mountain, and that he warned off the Defendant from shooting on the mountain. On cross-examination, the agent admitted, that he had first warned off the Defendant about five years before the trial, but that the Defendant took no notice of his warning; that about twenty years ago what he called the village of *Scartnaglowrane* consisted of only three or four houses, separated from each other, and that each house had a little farm about it.

The learned Judge left the following question to the jury, "Whether under the term of the said lease of the 9th *January* 1704, the 1,700 statute acres of wild mountain passed under the words, 'the village of *Scartnaglowrane*,' in the said lease contained." The jury found in the affirmative. But his Lordship being of opinion that, on the true construction of the lease, they did not pass, directed the jury to find a verdict for the Plaintiff. This direction was then made the subject of the first exception. The Defendant's counsel required the learned Judge to tell the jury that the whole mountain did pass under the lease, which his Lordship declined, and this formed the second exception. The Defendant's counsel then called on the Judge to tell the jury that inasmuch as the Plaintiff had not shown that he had derived the mountain otherwise than by a demise granted to Sir *Richard Pyne*, by the corporation for the making of hollow sword blades, it was for the jury to say, whether the mountain did not pass under the description "as fully

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and amply as the same is demised to the said Sir *Richard Pyne* by the said corporation." His Lordship refused so to tell the jury, and this formed the third exception. The Defendant's counsel then called on his Lordship to tell the jurymen that if they believed that *Thomas Travers* and his tenants, in the lease of the 9th *January* 1704, mentioned, had been in possession of the mountain in question, in and prior to 1704, they must find for the Defendant. His Lordship declined to do so, and this formed the fourth exception. The learned Judge was then called on to direct that it was for the jurymen to say, whether the right to sport over the mountain of *Scarnaglowrane* or *Tincurry* was appurtenant to the premises in the lease of *January* 1704 comprised, and if they were of opinion that it was so appurtenant, then to direct the jury that such right of sporting was granted by the said lease, and that the verdict must be for the Defendant. This his Lordship likewise declined, and being of opinion that there was on the issue no question for the jury, he directed a verdict for the Plaintiff. This formed the fifth exception.

The exceptions were argued in the Court of Queen's Bench; and on *November* 24th, 1855, judgment was given for the Plaintiff (Mr. Justice *Perrin* dissenting)(a); but this judgment was afterwards reversed by a majority of the Judges in the Exchequer Chamber, and error was now brought on this reversal.

A map or plan, which formed part of the Bill of Exceptions, was lost before the case came up to this House.

The Attorney-General (Sir *F. Kelly*) and Mr. *Prentice* for the Plaintiff in Error :

The only question properly in issue in this case was on the construction of the lease, and that was a question for

(a) 5 Ir. Law Rep., N. S., 120.

the Judge; it was in fact the question of parcel or no parcel. The deed itself contained the means of answering the question; the acreage mentioned in it sufficiently showed what did pass, and that acreage effectually excluded the mountain. There was nothing in the conveyance read by itself, or even taken in connexion with the evidence, which would render the word "village" capable of including the whole mountain on one side of which it was situated. That word had never been considered applicable to any but a collection of houses. In *Tomlin's Law Dictionary* it is said that a village is for the most part taken to be the out-part of a parish consisting of a few houses as if separate from it. That is precisely the case here, and the parties therefore have used the proper word to describe what was demised, which is that part which consisted of arable land, and of houses adjoining it, situated on a particular spot, and all connected together, and defined by known limits and described by acreage. But whatever was its meaning, being found in a deed, it was the duty of the Judge to put a construction upon it, *Plowden (b)*.

It is not contended that the evidence of what had taken place for years was not receivable *per se*, but still the question remained for the Judge, what was the effect of that evidence. It is impossible that the mountain, which is equally called the "Mountain of *Tincurry*" and "the Mountain of *Scartnaglowrane*," could be meant to be demised by the words "the village," for the lease contained a grant of "part of the village of *Tincurry*," and thence would arise the inconsistency that after the whole had been demised, a part of that whole was demised by the same lease. It is not because part of the mountain has

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(b) Comm. I., 168.

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been reclaimed that it will pass; there must be a distinct grant of the land, otherwise, whatever may be done upon it, it will as against the tenant be presumed to belong to the landlord, *Andrews v. Hailes* (c).

The question of fact was left to the jury merely to save any future expense, not from any doubt of the learned Judge that with him and not with the jury lay the question of the meaning that was to be assigned to the words in the lease, or that the meaning he assigned was the right one. The plan of the property amounted to nothing. The lease defined what was to be taken. It was the duty of the Judge to construe the lease, and to put the proper construction on it.

Mr. *Macdonough* (of the *Irish* Bar) and Mr. *Butt* (Mr. *Hemphill* of the *Irish* Bar was with them) for the Defendant in Error:

Assuming that the decision of the question lay with the Judge alone, it is plain that unless the lease necessarily excluded the mountain, the Judge was wrong. For, according to all the old authorities, the word "village" is not restricted to a mere collection of houses, but would pass the mountain. In *Sheppard's Touchstone* (d) it is said, "This word *village* is of large extent also. And by the grant of it a manor, land, meadow and pasture, and divers such like things may pass." So by *Coke*, it is said (e), "By the name of a town, *villa*, a manor may pass;" and *Fortescue* (f) says, "*England* is divided into bailiwicks or counties. Counties are divided into hundreds, and hundreds again are subdivided into vills, under which appellation cities and boroughs are included. The boundaries of these vills are not ascertained by walls, buildings, or

(c) 2 El. & Bl. 349.

(d) Page 92.

(e) Co. Lit., 5 a.

(f) De Lau. Leg. Angl. c. 24, edit. 1825.

streets, but by a compass of fields and large districts of land, some hamlets, and divers other limits, as rivers, water-courses, woodlands and wastes of commons. There is scarce any place in *England* but is within the limits of a vill."

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From the 13 & 14 *Car.* 2, c. 12, s. 21, it is plain that the words township and village are to be used as synonymous. And Lord *Kenyon*, in *The King v. Morris* (g), stated, that "*vill* and *hamlet* are in common acceptance used as synonymous terms." And the understanding of conveyancers in *Ireland* is shown in *Furlong on Landlord and Tenant* (h), where it is said, "The word *town*, by which the description of parcels in *Irish* leases and conveyances is usually commenced, has a very extensive signification, and is equivalent to a townland or township. The expression does not necessarily imply a collection of houses, but a chief denomination of land."

Now in this case all the Judges agreed that if the word *town* had been used instead of *village*, there would not have been any difficulty about the matter. In fact, they are synonymous. *Blackstone* says (i), "Tithings, towns, or vills are of the same signification in law." In *Spenser's View of Ireland* it is said that *villata* means plough lands, and *villata terræ* townlands. In the book of Inquisitions, containing the Repertorium of the rolls of the Chancery of *Ireland* (j), is a recital of a grant of *Elizabeth*, by which she grants three messuages, with their appurtenances, in the vill of *Boyle*, and 200 acres, and 160 acres of mountain pasture in the same vill. It is clear that in that grant vill was perfectly capable of comprehending a mountain. In the same book, in the 19 *James* 1 (k), *hamlet* and *villata* are used as synonymous terms. In the same

(g) 4 T. R. 552.

(h) I., p. 392.

(i) Com., Vol. 1, p. 114.

(j) Bk. 1, No. 2.

(k) No. 13.

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book, in the 6 & 7 *Charles* 1, “hamlets of land” are spoken of, which shows that *hamlet* was not, more than *vill*, confined to a collection of houses ; and in that book is also to be found a roll of the same year, in which “towns, villages, hamlets, &c. of land” are mentioned. *Spekman* (l) says, “*Hamleta Ham pro villa ; let autem membrum significat ; sic ut Hamleta propriè pars et membrum alterius ville, potius quam per se existens villula.*” That being so, if “hamlet of land” will pass large quantities of land, à fortiori, a *village* will do so. In 1698, six years before the date of this lease, it appears from the second volume of the Inquisitions of *Kilkenny*, that a person was seised of the vill and lands of *Clone*, containing 1,475 acres ; and in *Hibernica* (m) are to be found the orders for the plantation of *Ulster*, where were to be divided “such quantities of bogs as the country shall conveniently afford.” Mr. Baron *Pennefather* in this case (n) said, that there never had been a measurement of bog ; but in *Mulcarry v. Eyres* (o) an *Irish* lease of 100 acres of bog was declared good, for in *Ireland* it was said that such a word was perfectly well known.

The word *mountain* in *Ireland* has a signification which carries uncultivated land, *Lord Kildare v. Fisher* (p), where it is said “to describe both the quality and situation of land. The *English*, when they settled in *Ireland*, called such land as they improved arable, and the uncultivated part went by the name of mountain ;” and Lord Chancellor *Middleton*, when that case was before him, said that the word “did not necessarily include the situation, for that he had a great deal of a coarse land which was called moun-

(l) Gloss. voce Hamlet.

(m) Page 124, edit. 1747.

(n) 5 Ir. Law Rep., N.S., 230.

(o) Cro. Car. 512.

(p) 1 Str. 71.

tain, and yet did not lie upon a hill, but was as low as the arable land about it."

Again, the reservation of the right of sporting shows that the mountain was intended to pass, for no one would think of reserving the right of sporting among the houses.

No part of the defined acreage was bog. There was a bog on the summit of the mountain. The soil of the mountain was granted; but the grantor took care to reserve a right of turbary on it, which was, in fact, a reservation affecting the bog on the summit of the mountain. That reservation shows that the land itself was granted, and the reservation was made out of what was so granted. It is a reservation not out of the arable land, but out of the wild mountain. If there could be any doubt upon it, the exception is to be construed in favour of the lessee, *Sheppard's Touchstone* (q). The usage here shows the real meaning of the grant: where a grant is of ancient date, and contains general words, "the best exposition of it is long usage under it," *Chad v. Tilsed* (r). *The Duke of Beaufort v. Swansea* (s) is to the same effect. Here the usage was altogether in favour of the Defendant's right to the mountain itself: his tenants brought into cultivation what parts of it he and they pleased, and they paid him rent for it, and he himself sported over it, without molestation or pretence of hindrance, till a few years ago, and though he had within these few years been warned off, there was no proof that he had ever paid the least attention to the warning.

The question was at first properly left to the jury, and the Judge ought to have adopted the finding, and so entered the verdict. In *Irons v. Douglas* (t), the question had been left to the jury, whether the soil of a bog did or did not pass under a lease of 1792, and the jury found in the

(q) Page 100.

(r) 2 Brod. & B. 406.

(s) 3 Exc. Rep. 413.

(t) 3 Ir. Eq. Rep. 601.

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negative, for that since then the soil of the bog had been used and enjoyed by the former tenant. No objection was ever made to that case, on the ground that such a question had been left to the jury.

The *Attorney-General* in reply :

The lease here was not of one great parcel of land, which might possibly have included the mountain, but of several small parcels, with a defined acreage, which certainly did not include it. The word *village* had not such a wide meaning as is contended for by the other side ; it is not identical with *vill* ; it means only such houses as are outside of a parish ; and in *Todd's Johnson* it is described "as a collection of houses less than a town ;" and the evidence here shows that such must have been the meaning put on the word in this lease. The Judge, having taken the opinion of the jury on the evidence, had a right to apply that evidence, and put his own construction on the lease. There was evidence for the jury that the mountain consisted of 1,700 acres, but there was no evidence that all those acres had been enjoyed as of right as the property of the lessee in the same way as he enjoyed the village, and yet it is necessary for the Defendant to make out that fact before he can entitle himself to a verdict. *Chad v. Tilsed* (u) does not apply here, for in that case there was evidence of continued and uninterrupted acts of ownership over the whole property.

The Lord Chancellor (Lord *Chelmsford*) proposed that the following question should be put to the Judges :

Was there evidence given by the Defendant for the purpose of proving that the mountain of *Scartnaglowrane* or

1 (u) 2 Brod. & Bi. 403.

Tincurry was comprehended within the terms ‘Village of *Scartnaglowrane*,’ in the lease of the 9th of *January* 1704, which the Judge ought to have submitted to the jury in support of the affirmative of the issue which they had to try?—Agreed to.

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Mr. Baron *Bramwell*:

My Lords, I think the village of *Scartnaglowrane* is included in the measurement of the 148 acres. The lease describes the land in *Scartany*, containing ninety-four acres; *Garryroan*, containing 104 acres, and the village of *Scartnaglowrane* and part of *Whitechurch* and *Tincurry*, containing 148 acres. The copulative conjunction “and” is not put between *Scartany* and *Garryroan*, but is between *Garryroan* and *Scartnaglowrane*, which is coupled with part of *Whitechurch* and *Tincurry* in a joint measurement. If this is not the explanation, but four parcels are meant, I do not see why the first “and” was not omitted. It is natural to say *A.*, *B.*, *C.* and *D.*; but not natural to say, *A.*, *B.*, and *C.* and *D.*, unless *C.* and *D.* are in some way connected. Probably the village *Scartnaglowrane* was not separately estimated, because in truth it was a part of that part of *Whitechurch* and *Tincurry* said to contain 148 acres.

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I also think that the primary meaning of the word “village,” especially with such a measurement, is to include the houses, gardens, streets, village green, and similar premises *only*, and not to include 1,700 acres of waste land. If the case rested there, I should say it was “impossible” (as Baron *Greene* says) that the mountain could pass. But if on the face of a document, when applied by extrinsic evidence, it appears that words are used, or may be used, in a more extensive or a different signification than their primary, it becomes a question what more or other

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is included, than would be included in the words in their primary signification. Now the lessor reserves to himself certain rights on the mountain of *Tincurry*; that, on the face of the document, goes to show, that more or less of the mountain of *Tincurry* is comprehended by the parcels. If, on the evidence, it appears that there is no mountain of *Tincurry* except that claimed by the lessee, then that or part of it must be taken to have been demised. This raises the question of fact. Had it appeared that there was a mountain of *Tincurry* on which there might be common in the 148 acres, or other parcels, I should say that alone passed, but that does not appear. The evidence is the other way, as I understand it.

Then there was evidence to go to the jury of enjoyment of the entire mountain by the lessees. That was relevant, and I think should have been left to the jury; whether it should be held to pass by the words “the village of *Scartnaglowrane*,” or whether it should be held to pass by the words “part of *Whitechurch* or *Tincurry*,” I cannot say. Neither is properly applicable (with the acreage given), in its primary sense, to pass 1,700 acres of land. Either may have been meant by the lessor to do so, the one, for aught I can see, as much as the other. It may be that the acreage is a sort of *falsa demonstratio*, arising out of the peculiar laws and usages referred to in the argument, and mentioned by Chief Justice *Monaghan*; that is to say, it may be that it is the measurement of the inclosed land only, and that the parcels ought to be read, “containing 148 acres of inclosed land,” which would show that other land passed, but whether under the word “village,” or the other words, I cannot say. It may be, according to the argument of Chief Justice *Monaghan*, the parties would intend it to pass without using any words to include it; and I think if that intention appeared, with

reference to extrinsic evidence, it would suffice. If a man leased his farm of *A.*, in the parish of *B.*, and there was a covenant that fields *Y.* and *Z.* should be cultivated in a particular way, I think they might pass, though neither part of the farm nor in the parish of *B.* I think, therefore, the judgment was right, awarding a *venire de novo*. I need scarcely say, I offer no opinion as to the value of the evidence.

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Mr. Justice *Crompton*:

In this case the learned Judge who tried the cause directed the jury to find a verdict for the Plaintiff, and the Defendant thereupon excepted to that ruling, and the question now is, whether that ruling was correct.

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It is attempted to be supported on the grounds that the words of the lease of 1704 are such as that the lands in question could not, in point of law, pass under them; that no parol evidence was admissible to explain them; and that even if it had been, there was no evidence in the case from which an inference could be drawn that the lands in question were included in the lease. If it could be shown that mountain or waste land of the nature in question, and to the extent in question, could not pass by the word "village," as used in this deed, or that the 148 acres mentioned in the deed necessarily included the village, I should have been very much inclined to agree with the learned Judge; but I by no means think that such is the necessary construction of the word "village," or of the statement as to the number of acres.

The authorities appear to show, that the word "village" is a word sufficient to pass a district, and that it is not necessarily confined to the small collection of houses to which it is often confined in ordinary parlance. There is certainly no authority for saying that it is to be so con-

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finer; and in considering how a word is to be construed, we must always regard the subject matter and context. In a deed of conveyance, the word "village," in the limited sense, would certainly be very indefinite, depending on no known boundary, but on one liable to shift as every additional cottage or cabin is erected. And I do not believe it is a word which has been used in the sense now contended for in the description of property in a conveyance, whilst in the other sense, as describing some known district, as vill, town, townlands, &c., it would have an accurate and definite meaning.

Again, if it was clear that the 148 acres necessarily included the village, as well as the portions of *Whitechurch* and *Tincurry*, I should have great difficulty in saying that the 1,700 acres could pass, but this is by no means the necessary, perhaps not even the grammatical construction; and it may well be that the mountain or waste is left without any specified acreage, and unmeasured, according to the course appearing from the judgments of several of the learned Judges in the Court below, not to be an unusual one in *Irish* conveyances.

It must be remembered also, in favour of this construction, that there is evidence of the mountains of *Tincurry* and *Scartnaglowrane* being the same, and that the lease is made subject to the rights of turbary, the exercise of which seems to have been on the waste part upon the top of the mountain, and probably not in the small portion of the measured lands of *Tincurry*.

This old lease, therefore, seems to me sufficiently ambiguous as to what was to pass under these doubtful expressions to let in parol evidence according to the rule laid down by Mr. Baron *Parke*, in *The Duke of Beaufort v. Swansea* (v), where he says, "I have no doubt that all

(v) 3 Exc. Rep. 425.

ancient documents, when a question arises as to what passed by a particular grant, can be examined by modern usage." See also what is said by Mr. Justice *Cresswell*, in *Doe d. Wilkins v. Beviss* (w), referring to *Wadley v. Bayliss* (x).

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Parol evidence being, therefore, in my opinion, admissible to explain what passed under the general or doubtful words of the lease, I think that sufficient evidence was given from which the jury might find such a state of facts as would support the title of the Defendant.

Evidence was given of the mountain in dispute being grazed by the cattle of the Defendant's tenants, and that no one else grazed it; that the Defendant had always sported over it, a right to do so being, under the circumstances, only attributable to the right of soil; and that the Defendant and his predecessors had from time to time taken in parts of the mountain, not the subject of the lease according to the contention of the Plaintiff, and had tilled the same. These acts were proved to have taken place from time to time as far as living memory could go. I think that the Plaintiff might well contend that it might be inferred from these acts of modern user, that the whole district in question at the time of the lease was part of the premises mentioned in the lease as being "now or lately in the occupation of *Thomas Travers* and his under-tenants," and that they passed under the general or ambiguous words of the lease.

The right of sporting, as exercised by the Defendant, and claimed by him in respect of the right of soil, and the enjoyment by the Plaintiff of the right of sporting over the mountain not exercised to the exclusion of the Defendant, seem exactly conformable with the Defendant's

(w) 7 Com. B. Rep. 511.

(x) 5 Taunt. 752.

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construction of the lease, by which the Plaintiff was to have that liberty over the whole lands demised, but which is not given to him exclusively, so as to prevent the owner of the soil from his rights as such.

I have already referred to another strong circumstance, the exception, as it is called, as to the rights of turbary. I think that this provision may well be treated as making the demise subject to former existing rights of turbary on the mountain. The specified tenants of the lands specified in the lease probably had prior grants or rights of turbary, and nothing would be more natural than that the grantor should stipulate that such rights should not be interfered with; and the Defendant may fairly contend, that such rights are much more likely to have had reference to the unmeasured and wild parts of the mountain than to those parts which would probably have been reduced into cultivation, tilled, and measured; and he may refer to the modern usage as showing that the tenants of the Plaintiff have enjoyed in modern times such rights of turbary, and that there is no trace of such enjoyment on the parts to which the Plaintiff seeks to restrict the demise, whilst such rights have been recently exercised by such tenants on the top of the mountain in the only known turbary, clearly being without what the Plaintiff says was the demised land, and clearly within what the Defendant contends for.

I think that the parol evidence was admissible to assist in ascertaining what it was that passed under the lease in question, and that there was evidence at the trial to go to the jury in support of the Defendant's case, and that the learned Judge, therefore, was wrong in the direction he gave, and that there ought to be a *venire de novo*; and I accordingly answer your Lordships' question in the affirmative.

Mr. Baron *Martin*:

My Lords, the judgment which I am about to read is also that of my Brother Watson.

We think there is great difficulty in this case, and which is increased by the loss of the map, which is part of the Bill of Exceptions. In order to the parcel of land, viz., 1,700 acres of mountain, passing to the lessee under the lease of 1704, there must be words in the lease capable of comprehending and expressing it. This is a matter of absolute necessity, as well by the common law as by the statute of frauds.

The question put by your Lordships in substance is, whether there was evidence which ought to have been submitted to the jury, in order to the determination of the question, whether it was comprehended within the term “village of *Scartnaglowrane*.” There was evidence that there is and has been, as long back as memory extends, a village of *Scartnaglowrane* properly so called; that the place where it was and is, and the district of mountain now in question, were formerly all one. We also think there was evidence from which a jury might infer that the lessee and his under-tenants were, from the time of the granting the lease in 1704, in the exclusive possession of this mountain under the lease, and occupied it in the only way in which probably it was capable of being occupied, by grazing cattle upon it; that there is also evidence that they exercised, as of right, the dominion of inclosing or reclaiming parts of it, and cutting turf and killing game; which latter, if lawfully done, must have been by virtue of the possession of the soil, for there is no pretence for supposing that the lessee had any incorporeal right or easement to authorise it. Assuming the jury to find these points in favour of the lessee, if it be legally possible to construe the word

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“village” to comprehend the mountain, it ought to be so construed.

In *Sheppard's Touchstone* (y), the term “village or town” is said to be “of large extent, and by the grant of it a manor, land, meadow, and pasture, and divers such like things, may pass.” And we entertain no doubt that a waste, such as a village green, or a common, upon which the inhabitants of a village had common of pasture, might pass. The reference in “*The Touchstone*” is to *Coke Littleton*, page 5, and *Plowden*, page 168. In the reference in *Coke Littleton*, the word is “ville or town,” which is a more comprehensive term than “village,” and if “village” could be read as synonymous with “town,” in the sense of townland, there could be no doubt as to the sufficiency of the word in *Ireland* to pass the mountain. The reference in *Plowden* seems rather to weaken the authority. The word there again is “town;” and it is mentioned as a compound thing, which may have divers things appurtenant to it, *or parcel of it*; and it is said that it may contain land and pasture. But the reason given is, for that the houses may be decayed, and land and pasture be where houses formerly stood. If this be the true reason, and that nothing passed by the word “town” except where houses had been or are, it is difficult to see how the term “village” can comprehend 1,700 acres of waste mountain where no house probably ever stood.

After very great doubt and hesitation, we have arrived at the conclusion that there was evidence which ought to have been submitted to the jury in support of the affirmative of the issue. We are not insensible that it may appear to many, that to construe the term “*village of Scarina-glowlrane*” to comprehend 1,700 acres of mountain adjoin-

ing to it is an abuse of the English language. But we collect, from the judgment of Lord Chief Justice *Monaghan*, Mr. Baron *Pennefather*, and other of the *Irish* Judges, that in *Ireland* waste and unprofitable lands, although not noticed in conveyances, have been deemed to pass. And considering that, in leases for lives, renewable for ever (a species of title which largely exists there), the twenty years' possession (which generally concludes such questions as the present, where the fee simple is conveyed) is practically of no avail, we think we ought to be very cautious in limiting the operation of long-continued possession in the construction of leases, lest by possibility we should affect titles which have hitherto always been and now are considered unquestionable.

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Mr. Justice *Williams* :

My Lords, I am of opinion that the question which your Lordships have put to the Judges ought to be answered in the affirmative.

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 —

I think there was evidence of occupation and enjoyment of the mountain of *Scartnaglowrane* as far back as living memory could reasonably be expected to go, from which the jury might have presumed, if they had thought proper, that the same course of enjoyment had prevailed ever since the lease was granted, and on which, therefore, the question might have been asked them by the Judge, whether, in point of fact, the lessees had always enjoyed the mountain, as of right, under the lease, as parcel of the lands thereby demised.

It is obvious, however, that it would have been idle and irrelevant to have left this question to the jury, unless the Judge, on this fact being established by the finding of the jury, ought to have construed the lease in favour of the Defendant's contention, that the mountain passed by it ;

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but I am of opinion that, with the aid of that fact, and the other undisputed facts in the case, he ought to have so construed it.

It cannot be controverted that if this had been a lease of the *farm* of *Scartnaglowrane*, and there had been evidence that the tenant, as such, had, with his landlord's sanction, always enjoyed an adjoining waste, of which his landlord was proprietor in such a way as he would have been entitled to do if it were included in the demise to him, and would not have been entitled to do if it were not so included, the Judge who had to tell the jurymen what was the true construction of the lease would have told them that if they thought the evidence satisfactorily established such a state of facts, he was of opinion that the mountain passed by the lease (unless in a case where there was something in the context which precluded such a construction).

But it is said that the word "village" has a certain primary meaning, viz., a collection of houses; and that, as it was proved that there was a village in that sense, there is a subject which satisfies this primary meaning, and the rules of evidence will not allow a wider sense to be ascribed to the word. But I cannot agree that the word "village" has any such primary meaning when used as a description of the subject of a grant, or as a measure of its extent. In truth, if used in the modern familiar sense, it is a term wholly inappropriate and inadequate for such a purpose. It will pass, it has been argued, the collection of houses, including its street and gardens, and all within its ambit. But what is meant by the "ambit" of a village when the word is so understood? If it is used in its more ancient sense of a vill, or township, or townland, it is easy to understand that it has defined boundaries whereby its precise extent may be easily ascertained. But who can tell exactly what will pass by the grant of a "village" in the modern

sense of the word? Does it include the frontage land, if any there be, intervening between the houses, and if so, to what extent? If there are houses on one side of the street only, does it include the whole street, or any and how much of the land on the other side? If there are comparatively many houses on one side of the street, and but one or two at great intervals on the other, how much, if any, of the intervening frontage land on the latter side passes? If the village should gradually increase or diminish in the course of a long lease, what is to be the evidence of its original size?

I will not weary your Lordships by going over the abundant authorities that have been cited from the Bench and at the Bar, which incontrovertibly establish that in ancient times the word "village" had not the same meaning to which we have been accustomed in modern parlance, but that it had the wider sense, to which I have before adverted, and might well have included the mountain in question. Why, then, in construing a lease of the date of the year 1704, should the former sense be considered as the primary one? I think there is no good reason for so considering it, especially when it is borne in mind that renewable leases, such as the lease in question, like grants of copyhold, not unusually repeat, when the lease is renewed, the description of the parcels which has been handed down and repeated in every renewed grant from remote antiquity.

But it is farther argued that there are parts of the context which preclude this extended construction of the word "village." It is said that the mensuration of 148 acres applies to "the village of *Scartnaglowrane*," as well as "to part of *Whitechurch* and *Tincurry*;" and that this renders it impossible that a mountain of 1,700 acres could be included. But it is very unusual, and often, perhaps, impracticable to state the acreage of the lands comprised in a

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grant or lease to which a portion of waste ground is attached. And this would account for the omission of any such statement of the acreage of the village of *Scartnaglowrane*, supposing that it included the mountain, and that the mensuration of 148 acres applied only to the part of *Whitechurch* and *Tincurry*.

It was farther objected that as *Scartnaglowrane* mountain is also called *Tincurry*, the subsequent grant of part of *Tincurry* shows that "the village" could not include the mountain; for, if so, it would amount to an absurdity, viz., a grant of part of that which had already been granted in *total*. But it appears that there is a place called *Tincurry* at some distance from the mountain in question; and the admitted fact on both sides is, not that *Tincurry* is synonymous with *Scartnaglowrane* mountain, but that *Tincurry* mountain is another name for *Scartnaglowrane* mountain. It no more follows that the place called *Tincurry* is part of *Tincurry* mountain than that the city of *Salisbury* is part of *Salisbury Plain*, or the town of *Hounslow* part of *Hounslow Heath*, or the town of *Windsor* part of *Windsor Forest*. And if *Tincurry* was really a part of *Tincurry* mountain, it is somewhat strange that it should be measured by acres. It is surely very unusual that a part of a mountain should be described by the amount of its acres; nor do I understand how such a description would at all tend to define the portion of the waste intended to pass.

Lastly, I consider the subsequent reservation, to the tenants of the three estates mentioned in the lease, of the liberty of commonage and cutting of turf on the mountain of *Tincurry* (i.e. on the mountain in question) as a very material aid to the construction of the lease, for if the mountain as to which those rights are reserved passed by the former part of the lease, the insertion of such a reservation (it matters not what the legal effect of it is) is sensible

and intelligible. But if the mountain did not pass by the lease, then (notwithstanding the ingenious, though, as it seems to me, unsatisfactory, suggestions that have been made to account for the introduction of the reservation,) it seems to be quite insensible and inexplicable.

I agree that, unless words capable of including the mountain in question are to be found in the lease, this reservation, however fully demonstrative of the intention of the parties, would be inoperative to pass it. But for the reasons I have before given, I think the words "the village of *Scartnaglowrane*" sufficient for that purpose, if the facts of the case, coupled with the language of the lease, lead (as I think they may) to that construction.

Another minor obstacle occurs to me as to the proposition that the grant of the "village" must necessarily be applied exclusively to the collection of houses, constituting a village in the common acceptance of the word, proved at the trial to have been for some time in existence, viz., that such existence may or may not have commenced since the granting of the lease. This is a question of fact, which the jury, and the jury only, should determine.

Mr. Justice *Wightman* :

My Lords, I am of opinion that there was evidence given by the Defendant for the purpose of proving that the mountain of *Scartnaglowrane* or *Tincurry* was comprehended within the terms "village of *Scartnaglowrane*" in the lease of the 9th *January* 1704, which the Judge ought to have submitted to the jury in support of the affirmative of the issue to be tried.

The issue was, whether under that lease and the several and derivative and renewal leases under which the Defend-

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Ireland, appear to me quite sufficient to show that in the lease of 1704 the term “village of *Scartnaglowrane*” may have been used to include the mountain as well as the small collection of houses. If that be so, it is then necessary to inquire in what sense it was used in that lease, whether in the sense that would restrict it to the collection of houses only, or in the larger sense, which would include the whole mountain; and for the purpose of determining that question parol and other evidence is not only admissible but necessary.

If, then, evidence to explain in what sense the term “village” was used is admissible, the only remaining question is whether that which was given by the Defendant was such that the Judge ought to have left it to the jury, which I understand to mean,—was it of such weight that the jury might have grounded the verdict upon it? It seems to me that evidence, as far as memory can go, of acts done upon the land, which could only be rightfully done, for all that appears in respect of ownership of the soil, is strong evidence that the parties doing the acts had the right; and I may add that there was evidence that formerly the place where the houses are, and the mountain, were (as expressed by the witnesses) all one.

Without going through the evidence in detail, it appears to me that if the question was one for the jurymen at all, there was evidence which ought to have been submitted to them, and from which they might, if they thought fit, have drawn the inference that the mountain did pass by the demise of the village. I am also of opinion, as already observed, that the word “village” being of uncertain meaning as to what it may include, the question of its real meaning in that lease, and what it was understood and intended by the parties to include, was not to be determined by the

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Judge, but by the jury, upon the evidence adduced to show in what sense and meaning the parties used it.

Lord *Chelmsford*:

12 July 1859. My Lords, this is a Writ of Error brought upon a judgment given by the Court of Exchequer Chamber in *Ireland*, in an action of trespass for breaking and entering certain lands of the Plaintiff called *Scartnaglowrane*, or *Tincurry*, in the barony of *Iffa* and *Offa*, in the county of *Tipperary*, with dogs and guns, hunting and searching for game. It is unnecessary to state the pleas of the Defendant, because by the consent of parties an issue was directed to be tried, "whether under the lease of 9th *January* 1704, and the several derivative and renewal leases under which the Defendant's title is acquired, the Defendant is, as against the Plaintiff, entitled to the right of sporting over the lands in the plaint mentioned."

This issue was ordered according to the provisions of the 102d section of the Common Law Procedure Amendment Act, *Ireland*, 1853. But as one of the learned Judges of the Court below (Baron *Greene*) observed, "The issue raised a question wholly different from, and beside any which the pleadings suggested, and put the decision of that question upon the effect of a deed not previously mentioned at all." The consent of the parties, however, which is mentioned in the order, cures any objection which might otherwise have arisen; and it seems to have been agreed, that the right of sporting involved in the issue was one which did not arise out of a grant of it to be exercised over the land of another, but that it was connected with, and would therefore determine, the right to the soil itself. The real question, therefore, to be decided was, whether by the lease of 9th *January* 1704, certain mountain land of about 1,700 acres in extent, and

generally known by the name of *Scartnaglowrane*, but also called *Tincurry*, over which the right of sporting was claimed, passed to the lessee.

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[His Lordship here stated the demise, the substance of the evidence, and the exceptions: see *ante*, 651, &c.]

In considering the exceptions, it may be as well to dismiss at once the second, third, and fourth, which it appears to me the Defendant could not have maintained, and to confine myself to the first and fifth, which will be found to be virtually the same. The exception in both is to the Judge's direction to the jury to find a verdict for the Plaintiff. If it had been upon the first, to the Judge's refusing to tell the jury to find a verdict for the Defendant, and upon the fifth, to his refusal to tell the jury that the right of sporting was granted by the lease of 9th *January* 1704, and to find a verdict for the Defendant accordingly, neither of them would have been good; but upon each of them it will be seen that although the Defendant submitted that the Judge should have directed the jurors in a particular manner, yet the exceptions are pointed, not to his refusal to direct them as the Defendant insisted he ought to do, but to his direction itself, which upon the first exception was "to find for the Plaintiff," and upon the fifth, that "there was no question for them upon the issues, and that they were bound to find a verdict for the Plaintiff." These exceptions seem to me to raise sufficiently the real question, which is, whether there was evidence which ought to be submitted to the jury, to show that the mountain of *Scartnaglowrane* was parcel of the premises comprised in the lease of 9th *January* 1704, or whether the language of the lease was so clear that it required and admitted of no explanation, and was the subject merely of judicial construction.

In support of the opinion of the learned Judges who

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thought that parol evidence was inadmissible to explain the lease, it must be contended that the words used could not by possibility apply to and include the mountain land. Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude a portion of land, where the words are capable of either construction. The Judges, therefore, who decided that there was no question of fact to be left to the jury, must have been of opinion that the language of the lease was not capable of receiving a construction which would embrace the 1,700 acres of mountain land. They must have considered that the mountain land could not pass by the words “village of *Scartnaglowrune*,” whatever evidence of enjoyment of it by the lessee might have been produced. Now, it appears to me, that it was sufficient for the Defendant, in order to enable his case to reach the jury, to show that the word “village” was not a word of such limited and confined meaning as to be incapable of comprehending a large tract of country; but the learned Judge could not have withdrawn the question from them and taken it upon himself to decide, without being of opinion that the word “village” was of such precise and definite application, as to exclude *ex vi termini* any such large extent of land as the mountain land in question. But I think your Lordships will be of opinion that, so far from the word “village” being a word which any one can precisely define so as to be able at once to know what is and what is not comprehended within it, it is difficult, if not impossible, to find what was its exact meaning and extent at the time when the lease of 1704 was made. That its modern

popular meaning is different from its ancient signification is sufficiently apparent from the various authorities which were referred to in the course of the argument from *Fortescue*, from *Coke*, from *Sheppard*, and from other authors. None of the passages referred to from these writers assists in fixing any certain meaning to the term, but they all tend to establish what is sufficient for the present purpose, that it is a word which was formerly at least of extensive signification, and which might have comprehended within it a district as large as the mountain of *Scartnaglowrane*. It is quite unnecessary to go farther, because if the word "village" was capable of this enlarged meaning, then the Defendant's case ought to have been submitted to the jurors, not for the purpose of their deciding in the terms of the question of fact, upon which their opinion was taken by the learned Judge, "whether under the terms of the lease of 9th *January* 1704, the 1,700 statute acres of wild mountain land passed under the words 'the village of *Scartnaglowrane*,'" which in that form was a question for him and not for them, but whether the Defendant's evidence did not show an enjoyment of the mountain land as lessee under the lease of 1704, and as parcel of that lease.

It is unnecessary to consider the nature and effect of the Defendant's evidence; and perhaps it would not be right to do so, as it must be submitted to another jury. I think the learned Judge ought not to have decided the case himself upon his construction of the lease, but ought to have left the evidence to the jury; therefore, that the first and fifth exceptions are sustained, and that the judgment of the Court of Exchequer Chamber ought to be affirmed, and a *venire de novo* awarded.

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Lord *Cranworth*:

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My Lords, concurring, as I do, entirely in the view which has been taken of this case by my noble and learned friend who has just sat down, I might perhaps have satisfied myself by merely giving a silent acquiescence; but I think that would be hardly respectful to the learned Judges in *Ireland*, who appear to have been nearly equally divided upon the point now awaiting our decision. I shall, however, make but very few observations.

The only point for our decision is, whether the learned Judge at the trial was right in treating the question as one entirely of law, and not at all of fact; in other words, whether he was right in treating the description of the parcels as insufficient in point of law to include the mountain. It is certain that where parcels are described in old documents by words of a general nature, or of doubtful import, we may, indeed we must, recur to usage to show what they comprehend. Where, indeed, words have a clear definite meaning, no evidence can be admitted to explain or control them. Thus, a demise of my messuage at *Dale* could not by any parol evidence be shown to have been meant to describe not a messuage, but a sheet of water. The distinction is obvious. Here I agree with the opinions of the learned Judges whose assistance we have had in this House, that the words of the deed were sufficient to include the mountain, and that there was some evidence (I do not speculate as to its weight) to show that under the demise the lessees have had the enjoyment of the mountain.

The passage referred to from *The Touchstone* (z) is this, "This word 'village or town' is of large extent also, and by the grant of it 'a manor, land, meadow and pasture,

and divers such like things may pass." The passage shows that the word "village" is of a most comprehensive character, and though it does not refer specifically to a mountain as something which it may include, yet it makes express mention of a manor which certainly might include in it a waste mountain.

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Then if "village" might have been intended to include the mountain, is there evidence to show that it was so intended? I think clearly there was, even on the face of the deed itself. The reservation to the lessee of the right of sporting might perhaps have been made with reference only to the lands under cultivation; but I can hardly understand the reservation to tenants of other lands of the right to cut turf on the mountain, if the mountain was not supposed to be included in the lease.

It is not, however, on the evidence appearing on the face of the deed that I mainly rely. I think there is parol evidence of usage, from which it might reasonably have been inferred that under the word "village" the mountain passed. There was evidence that the Defendant's father had from time to time reclaimed and brought into cultivation portions of the mountain for which he and the Defendant, his son, had been receiving rent, and that their tenants alone depastured their cattle on it. This was certainly evidence to show that the Defendant had a title to the mountain under the lease, the language there used being sufficient to comprise it.

There is abundant evidence that the Defendant and his ancestors sported over the mountain at their pleasure, and without interruption. This also, though of a more doubtful nature, ought certainly to have been submitted to the jury as affording some evidence of ownership.

On these short grounds, therefore, that the word "village" would in point of law be sufficient to include

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the mountain, and that there was some evidence of the exercise of ownership by the tenants over the mountain which might be attributed to their right under the lease, I think the Judge was wrong in withdrawing the case from the jury, and the Court of Exchequer Chamber was right in saying that there should be a *venire de novo*, the first and fifth exceptions having been improperly overruled.

Lord Wensleydale :

My Lords, I agree in the opinion of all the Judges, who have been consulted by your Lordships, that there ought to be a *venire de novo*, and consequently that the judgment of the Court of Exchequer Chamber in *Ireland* ought to be affirmed.

Baron *Bramwell* indeed, in the first instance, intimated his opinion that upon the grammatical construction of the first clause in the use of the connective word "and," the village of *Scartnaglowrane* and part of *Whitechurch* and *Tincurry* were comprised in the 148 estimated acres, and if so, the mountain of *Scartnaglowrane*, which comprised 1,700 *English* acres, could not pass under the description of the village of that name. But I think it is clear that the sentence is reasonably capable of the construction, that the village of *Scartnaglowrane* was conveyed, and also part of *Whitechurch* and *Tincurry*, containing by estimation 148 acres; and if the evidence should show that the mountain of *Scartnaglowrane* was comprised in the term "village," as afterwards explained, the latter construction ought to be adopted.

I cannot help expressing my concurrence in the observations of Baron *Greene* on the very inaccurate mode in which the issue in this case has been framed. His criticisms upon it are perfectly just. The attainment of the desirable object of diminishing technicalities is naturally

enough followed by inconvenient laxity, but may easily be, and ought to be, avoided. The question ought to have been more distinctly stated; but I agree with him, that it is to be construed to be an issue on the Defendant's right to the soil under the lease of 9th of *January* 1704, and his consequent right of sporting over the mountain of *Scartnaglowrane*, and the *onus probandi* on that issue undoubtedly lay upon the Defendant.

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The mode in which the exceptions have been taken is also not very clear; and the same very learned Judge (Baron *Greene*) seems to have thought that the great objection on which the Defendant relies, that the Judge should not have at once directed the jury to find a verdict for the Plaintiff, but should have submitted the parol evidence to them, is not open on this record, and on that ground gives his opinion that the judgment of the Court of Queen's Bench should be affirmed. I think, however, that the direction to the jury to find a verdict for the Plaintiff on the ground that on the true construction of the lease the mountain would not pass, is sufficiently excepted to, though at the same time it is coupled with other suggestions as to the mode in which the Judge ought to have directed the jury, which are not well founded.

It appears from the record that the Defendant's counsel often excepted to the Judge's direction that the jurors were bound to find a verdict for the Plaintiff, and did so at the close of his suggestions. I am clearly of opinion, that this exception, although not perhaps made in the most proper mode, is well founded, and that there was evidence to be submitted to the jurors upon which they might have found for the Defendant.

In the course of the long and elaborate discussion which this case underwent in the *Irish* Court, some observations were incidentally made which are liable to be misunder-

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stood as to the limits within which parol evidence is receivable to explain deeds, as if it could be done only in cases of doubt. Some observations were also made to the effect that what was intended by the grantor might be always submitted to the jury when parol evidence was receivable. Whether parcel or not is often said, but not with strict propriety, to be a question for the jury, I apprehend that the true rule is perfectly well settled, and is fully explained in Sir *James Wigram's* excellent treatise on the subject. The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor. In deeds, as well as wills, the state of the subject at the time of execution may always be inquired into; and as with respect to ancient deeds the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed. These deeds are to be construed by evidence of the manner in which the subject has been possessed or used; for, as Lord *Coke* observes, "*optimus interpret rerum usus*" (a), *Weld v. Hornby* (b), *Duke of Beaufort v. Swansea* (c). Lord *Hardwicke*, with reference to the construction of ancient grants and deeds, says, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by. That was in the case of *The Attorney-General v. Parker* (d). Lord *St. Leonards* follows in *Attorney-*

(a) 2 Ins. 282.

(b) 7 East, 199.

(c) 3 Exc. 413.

(d) 1 Ves. 43; 3 Atk. 576.

General v. Drummond(e), and says, one of the most settled rules of law is, that you may resort to contemporaneous usage for the meaning of a deed. “Tell me what you have done under such a deed, and I will tell you what the deed means.”

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When the evidence of all material facts is exhausted, and there is still ambiguity, no parol evidence of the grantor's intention, as distinguished from extrinsic facts, can be admissible, except in the single case of there being two subjects, or two objects, to which the terms of the instrument are equally applicable, a condition of things which does not exist in the present case.

The question is, what passed under the description of the village of *Scartnaglowrane* in the deed of 1704? That the word “village” in deeds of old date might comprise land, is laid down in the passage so often repeated from the “Touchstone,” where it is treated as synonymous with “town;” and the great majority of the Judges, and indeed all the Judges whom your Lordships have ultimately consulted, are of opinion that the word is capable of being so construed. In modern deeds such a description would not be likely to occur. There would be a full particular of the land meant to be conveyed by specifying the number of acres, or some particular description; but in ancient deeds, especially in *Ireland*, where it appears that small account is made of the acreage of the waste, the simple description of “village” or “townland” may suffice.

Is there, then, evidence of enjoyment which ought to have been submitted to the jury as proof that at the date of the lease the mountain of *Scartnaglowrane* or *Tincurry* was enjoyed by the lessee? I am clearly of opinion that there is. There was evidence that the mountain of *Scart-*

(e) 1 Dru. & War. 368.

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naglowrane and of *Tincurry* were the same mountain; that those under whom the Defendant claimed sported over the mountain forty years ago, and were never stopped by any one; that part of the mountain was reclaimed from time to time, some as early as 1836, and that the Defendant's tenants had occupied and paid him rent for some; that some of it was tilled and fell back into a wild state; and that the Defendant's tenants always grazed on the mountain, and cut turf on it. This was the Defendant's case.

On the other side it was proved that the Plaintiff had for three years paid rates and income tax for it; that he had for ten years preserved game, and prevented any person from shooting; and that the Defendant was warned off, but would not go; that Lord *Glengall* had a deputation or licence from the Plaintiff since 1846 for shooting, and that the Plaintiff himself was not interfered with; and that the village of *Scartnaglowrane* consisted of a few scattered houses.

This constituted the case on both sides; and there was certainly evidence for some thirty years of acts of ownership exercised over the mountain, the most important of which was the reclaiming parts of the waste at different times, without objection on the part of the landlord, and without any payment of rent, to which he would have been entitled if the mountain was not part of the subject demised, coupled with payment of rent to the Defendant from the tenants, which he was not entitled to receive unless the land was his own. The acts of pasturage and shooting over the waste were proved, with some evidence to the contrary; and the question for the jury arises, whether all these acts of pasturing and shooting were to be considered as mere trespasses in a wild country, and the inclosures of the same nature, each of little value, made behind the landlord's back, an appropriation, or a sort of stealing of land without any authority, or whether they were done in the

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exercise of a right claimed by the Defendant; and whether the jury would presume, from modern acts, more properly disputed by the lessor, that the lessees always, from the date of the lease, were in possession of the mountain, and had as much enjoyment of it as the nature of the case would admit.

It was entirely for the consideration of the jury, upon the whole evidence on both sides, what character they would give to these acts; unless the jury had been satisfied that they were exercises of a right to the possession of the soil, and that the Defendant and his ancestors had enjoyed it from the date of the lease, the question would be decided against the Defendant, for the burden of proof lies upon him.

It remains to make some observations on the effect of the reservation to *Thomas Travers* and other tenants of the lands of *Burgess*, of free liberty of commonage, and cutting of turf on the mountain of *Tincurry*, upon which much has been said. I am not prepared to go the length of holding with Baron *Bramwell*, that if a man leased his farm of *A.*, in the parish of *B.*, and there was a covenant that the fields *Y.* and *Z.* should be farmed in a particular way, though those fields were not part of the farm, nor in the parish of *B.*, they would still pass; but I agree that the reservation of right of common on the mountain of *Tincurry* indicates an intention that the mountain of *Tincurry* should pass, and if there are words capable of passing it, it will pass. Therefore, if it shall appear that the mountain of *Tincurry* is not part of the 148 acres in *Tincurry* demised, but something else, and if the mountain of *Scartnaglowrane* and of *Tincurry* have been always held to be synonymous, so as to raise the inference that they were called by either name indifferently at the date of the lease, it will afford strong reason for holding that the mountain passed by the words the "village of *Scartnaglowrane*,"

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which are capable of passing it, independently of the proof of ancient possession of the mountain, already sufficiently commented upon; and if it did pass, the defendant would not probably be barred by adverse possession.

Therefore I advise your Lordships that the judgment of the Court of Exchequer Chamber should be affirmed, with costs.

Lord *Brougham* (who sat as Deputy Speaker):

My Lords, I agree so entirely with my noble and learned friends who have addressed your Lordships, that I need not detain you in giving my opinion upon this case. The question for us is not whether the evidence which was given is or is not sufficient to prove the affirmative, that the words “village of *Scartnaglowrane*” in the lease, will pass the mountain in question, but it is for us to consider whether there was evidence given upon that point which ought to have been left to the jury, and whether the learned Judge was right in withdrawing that evidence from the jury. The Courts in *Ireland* have differed in opinion upon the question. The Court of Queen’s Bench, the first court before which the case came, had one opinion; and the Court of Exchequer Chamber, differing from the former court, formed, in my judgment, the right opinion, that it was a question which the Judge ought not to have withdrawn from the jury, and, therefore, that there ought to be a *venire de novo*. I have, therefore, no hesitation whatever in agreeing with my noble and learned friends upon the grounds stated by them; at the same time, I own that, if I were upon the jury, and a *venire de novo* sent the case before me, I should have very little doubt upon the subject. But it is not necessary for me to say what my opinion would be: I would rather abstain from doing so, as the question before us is, Was the Judge right in withdrawing that evidence from the jury? Was it, or

was it not, a question for the jury? That there was evidence to go to the jury upon that question is to me quite clear, and therefore I consider that the Court of Exchequer Chamber in *Ireland* rightly held that the learned Judge was wrong in withdrawing it from the jury, and properly directed a *venire de novo*. I shall, therefore, move your Lordships (as I do not think my noble and learned friend made the motion) to give judgment for the Defendant in Error, and that a *venire de novo* be awarded.

Judgment for *venire de novo* affirmed.

Lords' Journals, 12th *July* 1859.

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ALGERNON GREVILLE - - - Appellant.
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Will.
Real Estate,
Charge on.
Legacies.
Power to Sell.

If there are general gifts of legacies, and then of the rest and residue, real and personal, blending the whole in one mass, (though accompanied by a power to the legatee of the residue, "to dispose of the same in any manner he may think proper"), the legacies are a charge on the realty (*dub.* Lord *Wensleydale*).

A testator gave a legacy, which, if not received, was to form "part of the residue of my property." Then followed a legacy to *A. B.*; but if the legatee should die before time for payment, it was to be considered "as part of the residue of my property, and to go and merge in the same." After some small legacies, his will concluded, "All the rest, residue, and remainder of any property I may die possessed of, whether estates, freeholds, &c. &c., bonds, bills, &c., annuities, &c., I devise and bequeath to my son, in the fullest manner I can, with liberty to him to dispose of the same in any manner he may think proper." The son was named as one of the executors, but did not act as such. The will was proved by the other executor. The son mortgaged the real estates:

Held, that the legacy to *A. B.* was a charge on the real estates, and

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on a sale of them in the Incumbered Estates Court, took precedence over the mortgages, notwithstanding the general power to the devisee to dispose of the estates in any manner he thought proper.

THIS was an appeal against a decision of the *Lord Chancellor* and Lord Justice *Blackburne*, sitting as Commissioners of Appeal, from the judgment of the Incumbered Estates Court.

John Browne, of *Galway*, had one son, *Michael J. Browne*, and two daughters, *Maria* (*Lady Ffrench*), and the Respondent. By his will (which contained many interlineations), dated 20th *January* 1825, he bequeathed to his wife an annuity of 100 *l.* in addition to what she was entitled to under her marriage settlement, "the same to be in lieu and satisfaction of any dower or thirds she may be entitled to out of my real estates, or any other property I may die possessed of," with the usual power of distress. Then followed a bequest of the household furniture to his wife; then a sum of 1,000 *l.*, in trust, to give such part of it as she might think fit to his daughter *Anne* on her marriage with her mother's consent, "to bear no interest till then; the entire (whole) or the remainder of the said sum of 1,000 *l.* to go and be considered as part of the residue of any property as hereafter bequeathed to my first object on earth, my best of sons, *Michael Joseph Browne*. I farther bequeath to my dear and very dear daughter *Anne Browne*, in addition to any part of the above recited sum of 1,000 *l.*, a farther or additional sum of 5,000 *l.* sterling, including the property already settled on her by my marriage articles; and also the value of the property made over for her use before, all payable on her marriage with the consent of her mother, the interest thereof, at five per cent., to be regularly paid till then. But should my said daughter *Anne Browne* die before her marriage, then my

will is that this bequest shall be considered as part of the residue of my property, and go and merge in same." To his daughter Lady *Ffrench* (to whom he had given as a portion 10,000 *l.*) and to her husband and children, and to his own sister *Julia* he left 5 *l.* a piece, and concluded thus: "As to all the rest, residue and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise, I hereby bequeath, devise, give, and grant the same to my first object on earth, my son, *Michael Joseph Browne*, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of the same in any manner he may think proper," and he appointed his son his sole executor. By a codicil he appointed *John Kirwan* his executor in case his son should not wish to act as one of the executors.

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The testator died in 1825, and the son having declined to act as executor, the will was proved by *Kirwan*.

Michael Joseph Browne, the son, entered into possession of the estates, and paid the interest on the legacy of 5,000 *l.* to his sister down to 1842. On the 1st September 1846 he mortgaged the estates to the Appellant and other persons. On the 29th May 1852 a petition for sale was presented in the Incumbered Estates Court, and an absolute order for sale was made on the 8th September 1852. On the 4th December 1855 the estates were sold for a sum of 69,410 *l.*, a sum not sufficient to pay off the mortgages and interest then due.

On the settling of the final schedule on the 15th December 1856, Mr. Commissioner *Longfield* held, that the Respondent, *Anne Browne*, was entitled to be paid the legacies bequeathed to her by the will of her father in priority to the mortgagees. The full Court confirmed this decision, and on appeal to the *Lord Chancellor* and Lord

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Justice *Blackburne* in the Court of Appeal, it was again affirmed. The present appeal was then brought.

The Attorney-General (Sir *R. Bethell*) and Mr. *Moxon* for the Appellant.

There is no necessary implication here to make these legacies a charge upon the land. The words may be satisfied by taking the residue of the personal estate, the rest of the testator's property. It is admitted that the Courts have sometimes shown a tendency to charge liabilities of this kind on land ; first, debts were charged, and now the attempt is made to charge legacies ; but that cannot be done in a case like the present, where the intention to create such a charge is not clearly expressed. There is no settled rule on the subject which can be appealed to as justifying the decision of the Court below. The chief cases are all the other way. The first is that of *Davis v. Gardiner* (a), where the personal estate not being sufficient to pay all the charges, the deficiency was held not to be chargeable on the land. The words were, "As to my worldly estate, I dispose of the same as follows: after my debts and legacies are paid;" then he gave several legacies. Of course "worldly estate" must mean both real and personal, but still no charge can be imposed on real estate without plain words of intention, or necessary implication, and so it was held there that none was created. Lord *Macclesfield* there said, "As plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir ; for a charge, so far as the value of it amounts, is *pro tanto* a disinherison." [Lord *Brougham* : What were the other words of that will?] They were, "After all my legacies paid, I give the residue of my personal estate to my son," and then he devised his fee-simple estate to his son, and his heirs. *Bench v. Biles* (b)

(a) 2 P. Wms. 187.

(b) 4 Madd. 137.

and *Awbrey v. Myddleton* (c) are distinguishable. In the former there was a gift of everything to the wife for life, and then, after her decease, different legacies were given; there they were held to be chargeable, but that was because the testator had begun by putting together the real and personal property, the whole of which was taken by the widow during her life, and so making all his legacies attach on that mass. That has not been done here. In the latter case the decision ought to be ascribed to the particular terms of the direction for payment of the legacies by the executor, and then the gift of the general residue of realty and personalty to him.

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In *Kightley v. Kightley* (d) it was held, that where there is only a general gift of legacies, they are not charges on the land, and that opinion, founded on the distinction between debts and legacies, was adhered to by the Master of the Rolls in *Shallcross v. Finden* (e). In *Cole v. Turner* (f) the freehold, copyhold, and leasehold estates were all blended together, and there was then a general gift of legacies which could not be satisfied except by making them a charge on the land. In such a case the decision was inevitable; for if I give to A. 5,000 l., and then all the rest of my manor of *Blackhouse* to B., the words of the two gifts would be insensible but for treating the 5,000 l. as a charge upon the land. *Mirehouse v. Scaife* (g) is not to be treated as an authority against the Appellant. It is there said, "If the term 'residue' was used by the testator with reference to what remained after deducting *Gillfoot*, before given, the meaning and construction must be the same as if he had first enumerated all his lands, and then had given *Gillfoot*, and then had devised all the rest of his enumerated lands. When the testator speaks of the 'rest

(c) 4 Vin. Abr. Tit. Charge D. Cas. 15; 2 Eq. Cas. Abr. 497.

(d) 2 Ves. Jun. 328.

(e) 3 Ves. 737.

(f) 4 Russ. 376.

(g) 2 Myl. and Cr. 695.

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and residue' of his personal estate, he certainly meant what would remain after payment of his debts and legacies. Is it not natural to suppose that he used those words in the same sense when applied to his real estate?" That is clearly erroneous. A legacy comes without any direction out of the personal estate; that was settled in *Kightley v. Kightley*, and submitted to in *Bench v. Biles*, and really acted on in *Cole v. Turner*. This expression of opinion in *Mirehouse v. Scaife* is the only one on the opposite side, and that is erroneous. In *Francis v. Clemow* (*h*) the testator first gave a pecuniary legacy, then a farm to his wife, at such rent as his brother *Robert* should think fit; then the rest, residue, &c., of his real and personal estate to his son *James*, whom he appointed executor; and Vice-Chancellor *Wood* held, that the residuary form of the devise to the executor made the legacy a charge on the real estate, notwithstanding that a previous interest in the real estate was given by the will. There, however, a wrong view was taken of *Bench v. Biles*, and *Kightley v. Kightley* was not cited. *Wheeler v. Howell* (*i*) simply followed *Francis v. Clemow*. The authorities, therefore, by no means make out the proposition asserted by this decision in the Court below. In *Mirehouse v. Scaife* Lord *Cottenham* forgot the rule, that where the words can be satisfied by one, the usual, interpretation, a Court is not justified in seeking for another. There is, too, a great distinction between debts and legacies, and the latter are not to be charged on land unless there is a clear intention so to charge them. No such intention is shown here. The words of the will must be taken *reddendo singula singulis*. "The rest of my property" mean my real estate, and apply to nothing else, and "the residue and remainder" mean that which remains, deducting what has been previously given, and are applicable to the personal

(*h*) 1 Kay, 435; see *Harris v. Watkins*, id. 438.

(*i*) 3 Kay & Joh. 196.

property alone, which is primarily chargeable with the legacies.

In *Parker v. Fearnley* (j) the testatrix made a gift of her furniture, and then of pecuniary legacies, which were to be paid within two years after her death by her executor; then she devised all her real estate to her son *Charles*, and to him she gave the residue of all her personal estate. The legatees filed a bill to charge the real estate, but Sir *J. Leach* refused it's prayer, observing that there were no words in the will to charge real estate. Here, too, the son had authority to dispose of the real estate, which authority he would not have required if it was only intended that he should dispose of what he was himself entitled to after all other claimants had been paid. The legacy here was only payable on the marriage of the daughter. The son had authority to dispose of the estate in any manner he thought proper. A charge payable out of the profits of land is, by a rule of equity, regarded as a charge payable out of the land itself. That was felt to be an evil, and therefore in modern times Judges have held, that an authority to dispose of the land authorises the person having it to give a valid discharge to the purchaser, even in cases where the money is not immediately payable to the *cestui que trust*, *Balfour v. Welland* (k), *Sowersby v. Lacy* (l), *Lavender v. Stanton* (m); and in *Stroughill v. Anstey* (n), where a power of sale to raise a particular charge was given, and the estate was devised subject to that charge, it was held, that a mortgage which, under the circumstances, was a proper way of raising the money to meet the charge, was within the power thus conferred. Here the case is still stronger. The son had the

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(j) 2 Si. & St. 592.

(k) 16 Ves. 151.

(l) 4 Madd. 142.

(m) 6 Madd. 46.

(n) 1 De G. M. & Gord. 635.

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general power to dispose of the estate in any manner he thought proper, which disproves any intention on the part of the testator to render the estate liable to legacies, and establishes the right of the son to give a valid title to the mortgagees, discharged of all liabilities.

Mr. *Roundell Palmer* and Mr. *Lawless* (of the Irish Bar), for the Respondent, were not called on.

The Lord Chancellor (Lord *Campbell*):

My Lords, in this case I am of opinion that the decision of Mr. Commissioner *Longfield* and Mr. Commissioner *Hargrave*, confirmed by the *Lord Chancellor of Ireland*, and the *Lord Justice of Appeal in Ireland* is right; and I think that if your Lordships were to come to a contrary conclusion, you would disturb the well-settled and useful rules of property which have prevailed for a century and a half.

My Lords, the first question is, whether these legacies are a charge upon the real estate. If it were *res integra*, and we had to construe this will by the language employed, without any reference to the construction which has been put upon similar language in other wills, I might allow that there is great force in the very able and ingenious argument we have had from the Bar. It might then be contended that the testator had no notion whatever of charging the land with these legacies; but we find that from the time of Lord *Macclesfield* and Lord *Cowper*, down to the time of Lord *Cottenham* and Vice-Chancellor *Page Wood*, a rule has prevailed upon this subject which has been acted upon uniformly by all Judges except Lord *Alvanley*, a very eminent authority (I do not mean in the slightest degree to disparage him), but with that exception by all the Judges that have determined such cases. For nearly a century and a half this rule has been laid down

and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift. That seems to me to be the view which was taken in the cases before Lord *Cowper* and Lord *Macclesfield*. The language in which it is expressed varies from time to time, but still that rule seems to have been uniformly acted upon, and I would say, in the language used by Vice-Chancellor *Page Wood*, in the last case upon the subject, *Wheeler v. Howell*, that in the present case "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge, the principle of the decision being in truth the same in the case of legacies as in that of debts."

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I therefore conceive it to be unnecessary to travel over and criticise that long series of cases which seems to establish that as a general rule which must be acted upon, that the testator, in using this language in his will, must be supposed to use it according to the sense in which the words have uniformly been construed, and to mean that the legacies should be a charge upon the real estate. Here the testator gives the legacies generally, and then he says, "As to all the rest, residue and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates freehold, leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities or otherwise, I hereby bequeath, devise, give and grant the same to my first object on earth, my son, *Michael Joseph Browne*, in the fullest manner I can." It is quite clear, that here there is first a general gift of legacies, and then

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there is a disposition of the rest, residue, and remainder of his property, real and personal, of what nature soever, to his son. Therefore, following the rule which has been so long acted upon, these legacies are clearly charged upon the real estate.

Then, my Lords, as to the second point, the discharge. Twenty-one years after the death of the testator, his son mortgaged the land for 50,000 £; and it is allowed, that upon the face of the deed there is no reference whatsoever to those legacies. No part of the legacies was paid; and I presume, that after he had thus charged the land with the legacies, unless there is some special power in the will enabling the son to sell the land discharged from the legacies, it can hardly be supposed that what has taken place can amount to a discharge of the burthen that was placed upon the land in respect of the legacies. No authority has been quoted to show that this power exists. Is there, then, here any such special power? I am of opinion that the words that follow what I have read are mere surplusage; they merely express what would otherwise be implied. This testator is fond of a florid style; he deals in superlatives; he is very rhetorical, and he makes use of a great many more words than would be sufficient to accomplish his purpose. He says, "I hereby devise, bequeath, give and grant the same to my first object on earth, my son, *Michael Joseph Browne*, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of same in any way he may think proper." We are now considering whether these lands have been discharged of the legacies: we must consider that they are charged with them. Then he, having thus charged the land, did he mean by those words to give his eldest son the power of disposing of the land at any time, so that the younger children would be deprived of the

security which he had before provided for them? I think that no such meaning can be educed from the language he employs, and that therefore this mortgage has not the effect of discharging the land of these legacies. My opinion is, that this Appeal should be dismissed, and the Decree affirmed.

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Lord *Brougham*:

My Lords, I entirely concur with my noble and learned friend, that these legacies are a charge upon the land. The only difference of opinion that I have with him is, that whereas my noble and learned friend said, that if it were *res integra*, not ruled by a long current of decisions, there might be a doubt about it, I really have no doubt at all about it. In the first place, I have no doubt that the decisions which have been given upon this subject are strictly and logically correct; and then I have no doubt also upon the construction of the words themselves, that the legacies here are a charge upon the land.

Lord *Cranworth*:

My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friends, and I also concur with my noble and learned friend opposite, that if there had not been a single decision upon this subject, if I were only called upon to say what is the meaning of such a devise, according to the natural import of the words, and knowing by what class of persons they are written, I should not have the least doubt in the world that nine persons out of ten would mean exactly what the cases have interpreted the words to mean. The distinction that is suggested between real and personal property is an artificial part of the case. It is perfectly true that we know how differently real property and personal pro-

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perty are dealt with by our law. And in reading a devise of real estate to one person and of personal legacies to another, and of the rest and residue of the real and personal property to a third, we may see that there might be a mode of interpreting it *reddendo singula singulis*, as meaning to give the rest of the personal property to one person, and the rest of the realty to another. But that is not the natural meaning of the words. I feel the force of something that was said by Sir *John Leach*, not in the case in *Maddock*, but in a subsequent case, where, with reference to the words "the rest and residue of my real and personal estate," he says, that the rest and residue mean something after something has been deducted. After what has been deducted? Why that which has been given before: and that appears to me to solve the whole difficulty.

The *Attorney General*, in his very able argument yesterday, tried to point out a distinction which exists in some of the earlier cases, for the purpose of showing that the generality of the rule, as laid down in the more modern cases, was not warranted by those earlier decisions; and he refers particularly to the case of *Awbrey v. Middleton* as being the earliest case upon the subject; and he endeavoured to distinguish that case by the circumstance that the legacies there were directed to be paid by the executor, and the gift of the general residue of the realty and personalty was to the executor. He is perfectly correct in that; but it is a singular thing that, not only does Lord *Cowper* not put his decision upon that, but counsel at the bar, adverting to that circumstance of the direction of the legacies to be paid by the executor, actually puts it as an argument for the contrary result, and says that, inasmuch as the legacies were to be paid by the executor, that shows that they were to be paid only out of the personal estate. In truth, in *Awbrey v. Middleton* the

real question, as I understand it, was whether, under the gift of "all the rest and residue of his goods and chattels and estate," real estate was meant to be included. There had been a previous gift in the will of a particular real estate, and the question seemed to turn upon this, whether the word "estate" there was to be held to include real estate. And Lord *Cowper* said that, inasmuch as he begins by saying, "As to all my worldly estate, I give in manner following," the word "estate" was to be taken to include real estate. But he does not put it at all upon the fact of the direction to the executor, who was his nephew and sole residuary legatee. What he says is this: "Now, the words (rest and residue) in this place may have some stress laid upon them, and seem to refer to the introductory clause in the will (as to all his worldly estate, &c.), which certainly extends to lands in a will, and will bear a larger construction by reference to the first clause, by which he intimates that he intended to dispose of all his estate, both real and personal, by his will, and therefore he was of opinion that by the devise of all the rest and residue of his goods, chattels, and estate, all his lands do pass to his executor, and that he takes by the will, and not by descent as heir at law."

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Then, with regard to the decision of *Bench v. Biles* before Sir *John Leach*, the *Attorney-General* endeavoured very ably to distinguish it from the present case. It appears to me to be utterly undistinguishable. It is true that in that case the blending of the real estate with the personal took place during the life of the widow, who took the whole during her life. What difference does that make? The testator gives all his real and personal estate to his wife for life; he gives pecuniary legacies, and all the rest, residue, and remainder of his real and personal estate he gave, devised, and bequeathed to his two nephews.

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How is the effect of that altered by the fact that there had been a previous life estate before the pecuniary legacies took effect?

That authority was followed by the same learned Judge in *Cole v. Turner*, when he was at the Rolls, and which has been evidently followed by Lord *Cottenham* in *Mirehouse v. Scaife*, and it has been since followed in two cases by Vice-Chancellor *Page Wood*. And I feel perfectly confident that if we could know the amounts of property that have been distributed, of which there is no report, in reliance upon the rule of construction laid down by these decisions, we should feel that we were doing the greatest possible injustice if we were to swerve in the slightest degree from what I consider to be the settled canon of construction: I therefore concur with my noble and learned friend that the judgment below ought to be affirmed.

Lord *Wensleydale* :

My Lords, the question in this case is as to the construction of the will of Mr. *Browne*. What is the true meaning of that will? I take it to be a long and well-established rule, that we must read the words of a will in their ordinary grammatical sense, and give them no other construction than that, unless so reading them leads to some absurdity, or some contradiction to another part of the instrument which is to be construed. There is no occasion to apply the latter part of the rule in this case.

Now, I confess that without reference to former decisions that have been given upon the subject, if I had read this will for the first time, and had not known that there was any decision upon it, I should not have entertained the least doubt as to its meaning. The testator first begins by a charge upon this estate of 100*l.* a year, with a power to distrain; that is clearly a charge upon the

real estate. He then gives other legacies of 1,000*l.* and 5,000*l.*, and other small legacies which are clearly *prima facie* a charge upon the personal estate; and then he gives the residue in these terms: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise," (that is both real and personal), "I hereby devise the same to my son *Michael Joseph Browne* in the fullest manner I can." I certainly should not feel the least doubt myself that the meaning of that was simply to leave the rest of the personal estate minus the charge upon the real estate. That would give effect to every word in the will; that is, "I leave the remainder of my real estate charged as aforesaid, and I leave the rest of my personal estate, which has several charges upon it before." I should not have had the slightest doubt that that was the true construction of it, and I should never have dreamt that the testator meant to say that the charge upon the personal estate was to be transferred to the real estate.

I have heard complaints at the Bar, and I have strongly shared in those complaints, that in all questions of this kind relating to wills, innumerable cases are cited which are of very little authority, because the words of one will differ so much from those of another, that there is very seldom any light derived from decisions upon other wills. If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed; but short of that, I think very little effect is to be attributed to former decided cases. And my doubt is certainly, after hearing the very able argument of the *Attorney-General* at the

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Bar, whether you can predicate from this long bead roll of cases, that any such principle has been established, that because a testator happens to mention real and personal property in one category, therefore the real property is liable for the legacies. But as my noble and learned friends take a different view, and consider that it has been established as a proposition that wherever realty and personalty are united together in one fund, they are both made subject to the legacies given by the will, of course, that rule of construction must be applied to this particular will. But I own for myself that it would require a much more careful consideration of the authorities than I have now been able to give to them to lead me to come to that conclusion. The impression upon my own mind is, that there has been no such positive rule established.

With respect to the other part of the case, I concur entirely with my noble and learned friend on the woolsack. I think these words at the conclusion of the will really give no power at all; they are only an amplification of his gift of the entire estate: "I give and grant the same to my son, *Michael Joseph Browne*, in the fullest manner I can;" that means merely, I give it to him in fee-simple, "with liberty to him to dispose of the same;" that is merely a consequence of his having the fee-simple. Therefore, I think in this case there is no power given to mortgage the estate free from the legacies.

Lord *Kingsdown* :

My Lords, I confess that when I read this will at first it appeared to me to be so clear upon the authorities, as I had understood them to be when I was more familiar with them than I am afraid I can boast of being now, that I thought that some subsequent decision must have altered or diminished the authority of those cases. But

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from the argument that has been addressed at the Bar, it appears, that instead of the rule being limited, it has been, I think, extended, I do not say at all too far, but certainly something beyond the exact principle to which those former authorities went, because it has been applied, I think, in the late cases (I do not mean to cast any doubt upon them) not merely to property given under the words “rest and residue,” but to property given previously to the gift either of the residue or the legacies. My Lords, I confess it seems to me that the rule is one of extremely good sense. If any person, unfamiliar with the technicalities of the law, were to read a will to this effect, the testator gives a certain portion of his property to one person, and devises all the rest of his property to another, I cannot doubt that his opinion would be, that “the rest” must be construed to mean that which remains after what has previously been given is withdrawn. The distinction which is relied upon by the *Attorney-General* is, I think, a distinction which is founded, not upon general principles, or upon the ordinary sense of mankind, but entirely upon the technical rules of the *English* law. If a testator, having an estate for 999 years, on leaseholds for years, made a devise of this kind, nobody could imagine but that he intended his personal estate to be subjected to the payment of his legacies; and if part of that estate, instead of being leasehold for 999 years, was in fee, or if, instead of being leaseholds for years renewable according to custom, it was leases for lives renewable for ever, no one could suppose that he meant to distinguish between the two, and that the one should be subject to legacies, and the other not.

I believe, therefore, myself, that the rule is founded in perfectly good sense and justice, and I must honestly confess that I think nothing but the great authority, and still greater ability with which the point has been argued

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at the Bar would have made it a subject of reasonable doubt.

My Lords, as to the other point, which was hardly argued at the Bar, I think when it comes to be considered, the point does not really arise. There is no doubt, I apprehend, that you may infer a power to give receipts and discharges where you have a power of sale, for the purpose of making certain payments; but where there is an absolute gift of the real and personal estate to the ultimate devisee for his own use and benefit, to dispose of it as he thinks fit, in what character is he trustee? If he had accepted the executorship, possibly some argument might have been raised. I do not say that even then that would have made a difference, but in that case possibly some argument might have been raised. But he is not executor; he is in no degree liable for the payment of the legacies; he is in no degree liable for the administration of the assets; he is simply owner of the estate subject to the charge. Even if he had been trustee, I should have doubted very much whether there was any power. If there had been such a power as the *Attorney-General* suggests, of disposing of the estate as he thinks fit, that would have made it a different question; but these legacies being charged upon the estate at a period which has not yet arrived, and which may never arrive, in what possible right can the owner of this estate say "I will raise this money"? What can he do with it, except keep it in his own hands till the period arrives, if it ever should arrive, at which the legacies would become payable out of the fund? Therefore I have not the smallest doubt in this case that your Lordships ought to affirm the decree of the Court below.

Orders appealed from, affirmed. Appeal dismissed, with costs.

Lords' Journals, 29th July 1859.

SIR W. ALOYSIUS CLAVERING, BART. - *Appellant.*

P. G. ELLISON AND OTHERS - - *Respondents.*

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Will.

Vested

Estates.

Condition

subsequent.

“Educated in

England,

and in the

Protestant

Religion.”

THERE is no foundation for the doctrine, that if there is a limitation in a will, which by itself gives a vested estate, and a condition is afterwards added, on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise.

A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning.

G. C. gave his real and personal estates to trustees, upon trust (among other things) to invest his personal estate, and pay the interest to his son, *T. J. C.*, for life, then to all the children of his son, and their heirs; and he gave all the residue amongst all the children, to be paid as they should attain twenty-one; “provided that the devises hereinbefore contained to the children of my said son are made upon this express condition, that they be educated in *England*, and in the Protestant religion, according to the rites of the Church of *England*; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of *England*, then I do hereby revoke,” &c., and there was a gift over:

Held, that the children took equitable estates tail, subject to be divested upon certain contingencies; that the proviso constituted a condition subsequent, to defeat vested estates, and was therefore to be construed strictly.

The children went with their father to *France* when very young, and remained with him there from 1802 to 1810, during which time he was detained as a prisoner of war by *Napoleon*, but they might have returned to *England* had their father so pleased.

They were during their continuance in *France* educated at Roman Catholic schools, but were not proved to have been taught Roman Catholic doctrines, but were able to receive religious instruction from a Protestant minister who attended each of their schools. On their return to *England* at the peace of 1814, they were sent to *English* Protestant schools:

Held, that under these circumstances they had not incurred the forfeiture within the words of the proviso.

GEORGE CLAVERING, late of *Green Croft*, in the county of *Durham*, esquire, the testator, had an only son, *Thomas John Clavering*, who, while travelling abroad

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during his minority, married *Clara Gullais*, a native of *France*, and a Roman Catholic.

The testator disapproved of the marriage of his son to a foreigner and a Roman Catholic. By his will, dated the 9th day of *January* 1793, duly executed and attested, he gave certain pecuniary and specific legacies; and, subject to and charged with his debts, funeral expenses, and these legacies, he gave all his real and personal estate unto trustees, upon trust to call in his personal estate, and to place the same out upon Government or real securities, and out of the rents and interest to pay certain annuities, and then to pay the residue of the rents and the interest unto his son *Thomas John Clavering* for life, and after the decease of his son, then subject as aforesaid, the testator gave his real estates unto all and every the child and children of his son, begotten or to be begotten, and their heirs as tenants in common, and if but one, then to such only child and his or her heirs; and he gave all the residue of his personal estate unto and amongst all the children of his said son, begotten or to be begotten, equally to be divided between them, to be paid and payable at their respective ages of twenty-one years, and in case any of the said children should happen to die before he, she or they should attain the age of twenty-one years, then he gave the share of him, her, or them so dying to the survivors, to be paid and payable at the time and in manner aforesaid. Then followed this proviso, “ Provided always and I do hereby declare that in case my said son shall reside more than three months in any year abroad, or shall not continue to profess the Protestant religion according to the rites of the Church of *England*, or his said wife shall not within the time aforesaid renounce the Catholic religion and embrace the Protestant religion according to the rites of the Church of *England*, or, having embraced the Protestant religion, shall, during the

life of my said son renounce the same and embrace the Catholic religion, then, upon any of the said contingencies so happening, I revoke the said devises so made to my said son, and declare that my said trustees and their heirs executors and administrators shall, from thenceforth from time to time during the life of my said son, place out the rents and profits of my said real estates and the interest and proceeds of my said personal estate, upon Government or real securities, for the benefit of all and every the child and children of my said son, equally to be divided between them, share and share alike if more than one, and to be paid and payable at such time and times and in such manner, and under and subject to the like limitations over as are hereinbefore declared of and concerning my personal estate, upon the death of my said son; Provided farther, and I do hereby declare that the devises hereinbefore contained to the children of my said son, are made upon this express condition, that the children of my said son be educated in *England* and in the Protestant religion according to the rites of the Church of *England*, and in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of *England*, then I do hereby revoke all and every devise to such child or children so educated as aforesaid, and do give devise and bequeath the share or shares of such child or children of and in my real and personal estates as aforesaid, unto and amongst such other child or children of my said son who shall be educated in *England*, and in the Protestant religion according to the rites of the Church of *England*, as if such child or children, so educated abroad and not professing the Protestant religion according to the rites of the Church of *England*, was or were actually dead, and in case all the children of my said son shall be educated abroad or not in the

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Protestant religion according to the rites of the Church of *England*, then I do hereby give devise and bequeath all my said real and personal estates unto and amongst my said nephews and nieces, in manner aforesaid in like manner as if all and every the children of my said son so educated abroad or not in the Protestant religion according to the rites of the Church of *England* was or were actually dead under the age of twenty-one years:" and the testator appointed the trustees executors of his said will.

The testator afterwards made a codicil, dated 1st *February*, 1793, in which was a declaration as to the rents and profits of his real estate, during the life of his son, to precisely the same effect, and almost exactly in the same words as the proviso in the will. The codicil gave these, under similar circumstances, to those persons who under his will would be entitled to his real and personal estate. In May 1793, he made another codicil, which, however, it is not material to consider.

The testator died in 1793, without altering or revoking the will or codicils, leaving *Thomas John Clavering*, his only son and heir-at-law, him surviving. The testator was the younger brother of Sir *Thomas Clavering*, of *Axwell Park, Durham*, but died before him. On the death of Sir *Thomas* without issue, the testator's eldest son, *Thomas John Clavering*, succeeded to the baronetcy. *Thomas John Clavering* had by his marriage with *Clara Gallais* six children, *James*, the eldest, who was born in *February* 1793, and died in 1824, without issue; *Clara Anna Martha*, born *February* 1794; *Agatha Catherine*, born *August* 1795; *Thomas Charles*, born *August* 1796; *Augustus George*, born in 1799 (both of whom died very young, and were considered out of the case), and the Appellant, born *January* 1800. In *May*, 1802, *Thomas John Clavering* (leaving his two youngest children in

England) went to *Paris*, where he took a house and lived there with his wife and four eldest children until *May* 1803, when *Napoleon* issued the decree making all *Englishmen*, between the ages of 18 and 60 years, prisoners of war, and he was removed to *Verdun*, and afterwards to *Orleans*, but was finally allowed to return to *Paris*, where he remained till the peace of 1814; he then came back to *England*, where he remained till 1818, and afterwards resided at intervals in both countries.

While *James* was in *France* he was sent to Roman Catholic schools, where, however, he was not compelled to take part in the Roman Catholic services, as a Protestant minister visited the schools. *James* remained in *France* till 1808, when he was sent to *England*, and went to *Harrow* for about a year, where, as it appeared, he had so forgotten *English*, that the tutor was compelled to communicate with him in *French*; he then went to the *Woolwich* Military Academy for about another year. He never afterwards received any school education, but remained in *England* till his death, which occurred in 1824, without lawful issue. The two daughters, *Agatha* and *Clara*, were likewise taken to *France* in 1802, and remained till 1810; they then returned to *England*, and remained here till about 1818, when they went abroad, and married. They had been while in *France* educated in Roman Catholic schools, where a Protestant minister attended. On their return to *England* they attended school for about a year, and were then taught by their own mother. *Agatha* married the Baron *Montfaucon*, and declared herself a Roman Catholic. *Clara* married the Baron *de Knyff*, and professed the Protestant faith. The Appellant had always resided in *England*, was brought up in the Established Church, and was educated at *Eton* and *Cambridge*.

Sir *Thomas John Clavering* died in *November* 1853, and

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was succeeded in his title and settled estates by the present Appellant. Lady *Clavering* died in *March* 1854.

On the 10th *April* 1854, the Appellant filed his bill in Chancery against the trustees and his sisters, for the purpose of having the trusts of the will declared, asserting in substance that he was the only child of Sir *Thomas John Clavering* that had been educated in *England*, and brought up as a Protestant according to the rites of the Church of England, within the terms of the will of his grandfather, and was therefore the only person entitled to the estates thereby devised, and the accumulations thereby provided.

Answers were put in, and evidence taken, and on the 28th *June* 1856 Vice Chancellor *Kindersley* pronounced a decree, whereby he declared the Plaintiff and his two sisters entitled as tenants in common to the real and personal estates and interests devised and bequeathed by the will of their grandfather, *George Clavering* (a). This decree was affirmed by the Lords Justices. The present appeal was then brought.

The Attorney-General (Sir *R. Bethell*) and Mr. *Bazalgette*, for the Appellant:

This is a case of executory trust. The limitation and condition must be taken together and construed as a contingent devise. No interest vested in the testator's grandchildren till they respectively reached twenty-one; they take as a class, and the equitable interest did not vest in any of them unless they answered the description of having been educated in *England*, and brought up as Protestants according to the rites of the Church of *England*. These were to be the qualifications on the possession of which the trustees (who till then continued

(a) 3 Drewry, 451.

possessed of the legal estate) were' to convey to them the shares of the testator's property. It is not therefore necessary for the Appellant (who did fulfil all that was required in the proviso) to show that his brother and sisters were educated abroad, and were brought up as Roman Catholics; it is for them to show that they were not educated abroad, and that they were brought up as Protestants according to the rites of the Church of *England*. Unless they fulfil the requirements in the proviso they are not entitled to take.

In fact they did not fulfil them. The family, with the exception of the Appellant, was taken to *France* in the year 1802, with the intention of being there domiciled. *Thomas John Clavering*, the father, took a house and furnished it, a fact which with other similar circumstances showed his intention to be domiciled in *France*. Again if he had not intended to bring up his children in *France*, he might have sent them back to *England* for education, though he himself was prevented from returning here. The decree of *Napoleon* detaining certain persons as prisoners of war affected only males of a certain age; all others, and all females and children, were at liberty to return to this country. *T. J. Clavering* himself was detained, but his wife and children could have returned. They did not; and when, after the peace of 1814, they came back to *England*, the eldest son was sent to *Harrow*, where at first his tutor was compelled to speak to him in *French*, so completely had he forgotten his own language; and he then went to *Woolwich* for a year and a quarter, when his education was treated as finished. This was a mere pretence of giving him an *English* education, and it sufficiently shows that the children were not brought up and educated in *England*. Then, as to being educated as Protestants. During the whole time *James* was at school

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there is no evidence that he received any religious education whatever.

Education here means bringing up; substantially the education ought to have been *English*; it was *French*. The eight most important years of the lives of the children were spent in *French* schools, so that *James* actually forgot his own language. After that, a year or two spent in *England* could not be called a substantial compliance with the provisions of the will. The same meaning may be given to the word "educated" in this will as would be given to it by different colleges in the two universities, where boys educated at certain schools are in virtue thereof entitled to maintenance and other privileges at the universities, of which King's College, *Cambridge*, furnishes an example.

The construction put on the words "educated abroad" that they meant entirely educated there, so that if the children were even only partly educated in *England* the intention of the testator would be complied with, is erroneous. It is wrong to apply to this will the rigid rules of construction applicable to a condition subsequent, yet this was done in the Court below.

The proviso in the will cannot be treated as a simple condition, on the breach of which the land will descend to the heir-at-law. That would be to defeat part of the will. The proviso affects the eldest son; he is the heir-at-law; if he does not comply with the condition, and give himself the qualifications on which alone he is to be entitled to have a conveyance of the estate, the gift over must take effect, and the trustees must convey to the person who is possessed of the requisite qualification. Such is plainly the intention of the testator: it is expressed both in the positive and negative form, for it is declared that the children shall be educated in *England* and brought up as

Protestants, and shall not be educated abroad or not brought up as Protestants.

There is, therefore, no such uncertainty as the *Vice-Chancellor* fancied when he applied to this case the ruling in *Fillingham v. Bromley* (b); nor can the doctrine as to conditions subsequent defeating vested estates be applied, for here the estates did not vest, except on compliance with the proviso, which was, in fact, a description of the person entitled to take, and to whom, on his answering the description, the trustees were alone at liberty to convey.

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Mr. *R. Palmer* and Mr. *Amphlett*, for the Respondent:

The children here, immediately on the death of the testator, took vested estates in tail in remainder. The proviso is a condition subsequent, which would defeat those estates, and it must be construed with the strictness applicable to conditions subsequent. In *Egerton v. Brownlow* (c), Lord *St. Leonards* protested against the doctrine of executory trusts, yet this appeal entirely depends on their recognition. Here the estates are executed, and the Courts will not mould the will so as to give them a different character.

Conditions of forfeiture are not favoured at law, and this is an attempt to enforce a forfeiture. Now, a forfeiture will only be enforceable where it must, not where it merely may be, incurred. *Fillingham v. Bromley* (d). There a condition required a devisee to "live and reside" on an estate: he did wholly reside there for years, and when he ceased to be there continually, retained servants there on board wages and was rated as the

(b) Turn. & Russ. Append. 530. (d) Turn. & Russ. 530.

(c) 4 H. L. Cas. 209.

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occupier. The condition was held too uncertain to justify a forfeiture. *Jones v. Suffolk* (e) shows, that the ground of forfeiture must be clearly made out, and that when it is uncertain it will not be enforced. The condition here is uncertain.

There is not here any clear evidence that *T. J. Clavering* went abroad with the intention of changing his domicile, while the contrary may well be inferred from the fact that he left two of his sons and all his moveable property here. His long residence in *France* was the result of a *vis major*; he was constituted a prisoner of war. Imprisonment or illness is, even under the statute against non-residence, a complete answer to mere length of absence. *Butler* and *Goodale's* case (f), *Scummel v. Willet* (g), and the circumstance of the forcible detention in *France* here forms a complete answer to the absence of the father. But even if that was not so, the testator did not make the children's estates depend on the same circumstances as that of the father, and certainly did not intend that their interests should be affected by their father remaining so long abroad as might possibly, in his own case, occasion a forfeiture. The testator here has not so clearly defined his intention with regard to what he meant by the education of the children, as to enable the Court, according to principles established with respect to conditions subsequent, to defeat estates already vested. The rule, therefore, to be found in *Fillingham v. Bromley* (h), *Corbet's* case (i), and *W—— v. B——* (j), applies here. The gift over here is not made in a form by which a vested estate tail can be defeated. The event contemplated here has never occurred, and, therefore, the forfeiture cannot

(e) 1 Bro. Ch. C. 528.

(f) 6 Co. Rep. 21 b.

(g) 3 Esp. N. P. Rep. 29.

(h) Turn. & Russ. 530.

(i) 1 Co. Rep. 77.

(j) 11 Beav. 621.

take effect. *Ridgway v. Woodhouse* (*k*); where, because, though the condition was not illegal, yet, as the rents to be forfeited were to be paid to a charity, which could not be under the Statute of Mortmain, the forfeiture itself was defeated. The children here were not educated abroad, for they were educated partly in this country and partly abroad, and to work a forfeiture, the exact thing spoken of in the condition of forfeiture must occur. *Schell v. Tyrrell* (*l*). Here part of their education was in *England*, part abroad, and the last in *England*. The condition of forfeiture, therefore, is either too uncertain to be applied, or, in fact, it does not apply, for a state of things has happened which was in no respect anticipated in the will.

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The *Attorney-General* in reply :

The words, "the gifts to the children of my son are made on this express condition," cannot be struck out of the will, but full effect must be given to them. They show that the estates do not vest, but remain executory. This is not a condition of forfeiture, but is a gift to such of the children as shall be educated in *England*, while, on the other hand, as to such of the children as shall be educated abroad, the estate is given over. If the children have not been educated in *England*, they are not qualified to take. The words in this will have exactly the same meaning as the words in the oath, "the Princess *Sophia*, and the heirs of her body being Protestants." They are part of a description of the persons. Here, some of the children were not educated in *England*, and so did not come within the description. The *vis major* is not an answer here: it did not make the father go abroad and furnish a house in *Paris*, nor did it compel him when in *France* to choose Roman Catholic schools for his children, or to

(*k*) 7 Beav. 437.

(*l*) 7 Sim. 86.

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retain them there. He might have sent the children to *England*; he did not, and those alone who remained here answered the description of those to whom the estate was to be given. Of these the Appellant is the only survivor. The estates here did not vest; the whole were in the trustees, for the purpose of conveyance to such of the children as should answer the description given in the will. Trusts are now the same that uses were before the statute. Assuming this to be a use, it must be taken according to the intent. Then in favour of what children will the use arise? In favour of those who answer the description. The gift is "to the children of my son on this express condition," from which it is plain that the condition of answering the description is the condition, and the condition precedent on which they are to take. Without that they have no title to take. In all cases where the law operates by way of shifting or secondary use, a proviso will take effect whether the words are words of condition, or words of limitation. As Lord *St. Leonards* said, in *Egerton v. Brownlow* (*m*), it is "a case of contingent limitations, with a series of shifting or secondary uses, limited upon those contingent limitations," and that relieves the case from the difficulty of treating these provisions as strict conditions at common law.

The Lord Chancellor (Lord *Campbell*):

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My Lords, in this case I am of opinion that the decree appealed from ought to be affirmed.

Before Vice-Chancellor *Kindersley* and before the Lords Justices, the arguments seem to have proceeded upon the assumption that equitable estates tail had vested in the grandchildren of the testator, the question chiefly discussed being, whether those estates had been forfeited by

(*m*) 4 H. L. Cas. 1. 208.

a breach of the conditions created by the will; and upon this assumption proceeded the argument at your Lordship's Bar of Mr. *Bazalgette*, one of the counsel for the Appellant. But the *Attorney-General*, on the same side, took a different view of the subject, and with great perspicuity and force contended that this was a case of executory trust; that no interest in the estates devised could vest in any of the grandchildren till they reached twenty-one; that the limitation in favour of the grandchildren was to them as a class, and that the equitable interest must be considered as intended to vest only in such of the grandchildren who, at the age of twenty-one, answered the description of having been educated in *England*, and in the Protestant religion, according to the rites of the Church of *England*.

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From my sincere respect for the argument of the *Attorney-General*, I have several times very attentively perused the will which we have to construe; but I have come to the conclusion that, on the death of the testator, the grandchildren, as they severally came into *esse*, took vested equitable estates tail, liable to be divested for breach of conditions subsequent, which the will created. The material parts of the will are these. [His Lordship read them.]

Now, independently of what follows the gift over on failure of the issue of the son, can there be the smallest doubt that, after the death of the testator, the son took a vested equitable estate for life, and the grandchildren took estates tail as they came into *esse*? The trustees took the legal estate, and the legal estate remains in them, as the annuities still subsist. No other duty is imposed upon the trustees beyond what has been specifically mentioned.

The testator then goes on to create conditions or conditional limitations in the usual form, and renders the

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estates liable to be divested by forfeiture, but he directs nothing to be done inconsistent with the equitable estates remaining vested till a forfeiture accrues.

I can find nothing in the will to create the supposed executory trust, under which the trustees were to provide for the maintenance of the grandchildren during their minority, nor anything to show that the interest of the grandchildren was to remain contingent till they reached twenty-one. The proviso respecting the grandchildren declares, that "the devises to them are made upon this express condition, that the children of my said son be educated in *England*, and in the Protestant religion, according to the rites of the Church of *England*." These are apt words by which conditions subsequent may be imposed. There is no authority for the doctrine, that if there be a limitation in a will, which, by itself, will give a vested estate, and a condition is afterwards added, for a breach of which the estate is directed to go over, the limitation and condition shall be construed into a contingent devise to the person or persons who answer the designation in the limitation, and who have performed the condition, the performance of the condition being added to the designation of the person or persons intended to take.

The testator undoubtedly intended that none of his grandchildren who were not educated in *England*, or were not brought up in the Protestant religion according to the rites of the Church of *England*, should continue to enjoy any share of his property; but I can see nothing to indicate that equitable estates tail should not vest in them, severally liable to be divested for breach of the conditions. I have perused again the opinions of the Judges and of the law Lords in the great case of *Egerton v. Lord Brownlow*, and I can find nothing in them to sanction the doctrine contended for.

I therefore think we must treat this case as it was treated in the Courts below, by considering that equitable estates tail did vest in the grandchildren as they came into *esse*, and by inquiring whether either of the conditions was broken in respect to any of the grandchildren, so as to work a forfeiture.

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Agreeing substantially with the elaborate judgments of the *Vice-Chancellor* and the Lords Justices, I shall be satisfied with making only a few observations on this part of the case.

The true conditions I consider substantially to be, that the children should not be educated abroad, and that they should be brought up in the Protestant religion according to the rites of the Church of *England*. These are conditions subsequent, and it lies on the Plaintiff to show clearly that one of them has been broken with regard to each of his brothers and sisters whose portion of the inheritance he claims.

I do not think that either of these conditions can be considered void, notwithstanding the latitude given to courts of justice, by the decision of this House in the *Bridgwater* case, to hold conditions void which they may deem contrary to public policy. Even as conditions subsequent, to defeat vested estates they must be construed strictly, and to work a forfeiture there must be shown a breach of a defined line of conduct which the parties concerned must reasonably have known would work a forfeiture.

First, as to the construction of the condition of not being educated abroad: I am of opinion that the forfeiture can only be incurred if the children can truly be said to have had the substantial part of their education abroad, and still more that this happened without the father, who was to superintend the education of the children, being forced,

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against his inclination, by the *vis major*, to keep the children abroad for education. Now I think it very doubtful whether any of these children can truly be said to have been educated abroad, within the meaning of the condition. Take the eldest son, *James*, who was born in *England*, and who was educated in *England* till he was above nine years old. He then went with his father to *France*, where he remained rather more than six years, when he was brought back to *England*, and remained here till he attained the age of twenty-one. On coming to *England* he was sent to *Harrow*, and then to a military academy at *Woolwich*, for the purpose of being instructed as a soldier, and qualified in that capacity to serve the Sovereign of *England*. He received a part of his education abroad, but how can I say that he was educated abroad, within the sense in which the testator used that term?

The case of the two daughters does not materially differ. As to *Clara*, afterwards *Baroness de Knyff*; of the twenty-one years of her minority she was thirteen years in *England* and eight years in *France*. She returned to *England* when sixteen, and remained here finishing her education till she was of age. *Agatha*, *Baroness Montfauçon*, like her sister, was thirteen years of her minority in *England* and eight years in *France*, her education going on in *England* before she went to *France*, and after she returned, till she reached her majority. I cannot certainly say that either sister was educated abroad within the meaning of the condition.

I am farther of opinion that weight is to be given to the *vis major*, by which their father was prevented from returning with them sooner to *England*. There is no evidence to show that he went to *France* during the peace of *Amiens* with a view of permanently settling there with his family, and unquestionably he never lost his English domicile. He

left two of his children behind in *England*, with servants at his country house. The only circumstance relied upon, occurring in *France*, to show that he meant permanently to establish himself there, is, that, instead of living at a hotel in *Paris*, or taking a furnished house, he hired an apartment, or *flat*, unfurnished, and had it furnished for him by an upholsterer; but that might be more convenient and more economical. In 1803 he was suddenly seized and treated as a prisoner of war, and sent to *Verdun*, where he was kept in close custody; and although afterwards the rigour of his captivity was mitigated, and he was permitted to reside at *Orleans* and in *Paris*, he remained a prisoner of war till the peace in 1814, when he immediately returned with his family to *England*. Had the children been included in the arrest, I conceive that their residence abroad, under continued duress, would not have worked a forfeiture, and if their residence abroad may be fairly ascribed to the imprisonment of their father by *Napoleon*, the forfeiture might be saved on this ground, were there a necessity to resort to it.

We have now only to consider whether there has been a forfeiture by a breach of the second condition, that the children should be educated in the Protestant religion according to the rites of the Church of *England*, as to which I have never entertained the smallest doubt. It has been argued as if the condition required the children to be taken regularly to a place of public worship, where Divine service should be celebrated, by a priest in orders, according to the Book of Common Prayer, and where they might hear the *Athanasian* Creed said or sung on all the Sundays and Saints days appointed by the Rubrick for that purpose. I find no language in the will upon which such a construction can be put, and I conceive the true meaning of the condition to be, only, that the children should be brought up as Protestants in communion with the Church

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of *England*. This they might have been had they remained in *England*, although, on account of sickness or distance from any place of public worship, they might very rarely have had the advantage of the ministrations of a regularly ordained clergyman, and although the service from the Liturgy might have been read by a female.

Dr. *Johnson*, in his verses written in the *Hebrides* to celebrate the pious and edifying manner in which he had passed a *Sunday* there far from any church, a daughter of Sir *Allan Maclean* reading the service from the *English* Liturgy, says,

“*Quid quod sacrifici versavit femina libros,
 Legitimas faciunt pectora pura preces.*”

All these children appear, while in *France*, to have been carefully brought up as Church of *England* Protestants. It is not proved, and there is no reason to suspect that they were ever at any Roman Catholic place of worship or at all under the religious tuition of any Roman Catholic. While at Madame *Campan*'s and other seminaries, a Protestant governess and a Protestant ecclesiastic had an opportunity of instructing them in the Protestant faith. And when their father was permitted to join them in *Paris*, it is in evidence that he himself regularly on *Sundays* read to them the proper service of the day from the *English* Book of Common Prayer. They all returned Protestants to *England*, and so remained when they had reached their majority. While the eldest son was at *Harrow*, where he must regularly have attended chapel, the young ladies were residing at their father's country seat in the north of *England*. The clergyman of the parish bears testimony that they were constantly in the habit of attending the parish church there; that he frequently conversed with them; that they appeared to have been educated in the tenets of the Church of *England*, and that he had not

the slightest suspicion of either of them having any tendency to quit the religion in which they had been reared. Thus, there is not only an entire absence of evidence of this condition being broken, but there is the presence of positive and express evidence that it was substantially complied with.

For these reasons, my Lords, I must advise you that this appeal be dismissed with costs.

Lord *Cranworth* :

My Lords, I have little or nothing to add to what has fallen from my noble and learned friend, concurring as I do entirely in the result at which he has arrived.

I quite agree with him in thinking that there can be no doubt, on the true construction of this will, that the children took, not vested legal estates but equitable estates tail, subject to be divested according to the direction of the testator upon certain contingencies.

Now it was supposed that the doctrine on this subject had been altered or modified by what passed in the *Bridgewater* case. I do not consider that to be at all a just inference from what fell from noble lords on that occasion. The use of the word "condition" in that case might have been wrong, but I think Lord *St. Leonards* expressly explains that in construing conditional limitations, or shifting uses which are to arise upon conditions, exactly the same principle must be applied. So that after all it is a mere discussion about words. And I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

In my opinion, if there was no direct authority for it,

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Aug. 1, 10.*Wills.**Legacy.**Settlement.**Ademption.**“Farther.”*EDWARD JOHN GREGGE HOPWOOD - *Appellant.*FRANK GEORGE HOPWOOD - - *Respondent.*

THE presumption of law is against double portions ; where a sum of money is given by the will of a parent to a particular child, and the like sum is afterwards secured by a settlement on the marriage of that child, there is a presumption in favour of the ademption of the legacy, but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is not necessary that the legacy should be paid in order that it may be adeemed.

Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil.

A father made his will, giving to each of his three younger children 5,000 *l.* On the marriage of one of them, a daughter, he paid to the husband 2,000 *l.* By a codicil he declared that sum to be in part satisfaction of the 5,000 *l.* One of his younger sons, *F.*, married. On that marriage, the father entered into a covenant that he would cause to be paid to the trustees of the marriage, within twelve months after his death, the sum of 5,000 *l.*, with interest in the meantime, at the rate of five per cent., such interest to be employed in the payment of premiums on life policies. By a codicil made after the date of this settlement, the testator recited what he had given by his will to each of his two younger sons, and directed his trustees to raise “a *farther* sum of 7,000 *l.*” for each of them, and to hold such farther sum on the same trusts as those of the 5,000 *l.* The testator afterwards raised a sum of 5,000 *l.*, with which he purchased a Lieutenant-colonelcy in the Guards for his other younger son, *H.*, and he then made a codicil, declaring that this sum, so laid out, was to be taken by *H.* in satisfaction of the legacy given him by the will :

HELD, that these circumstances did not show an intention on the part of the testator rebutting the presumption that the 5,000 *l.* given by the will to *F.* were adeemed by the settlement.

Meaning of the word “ farther.”

THIS was an appeal against an order of *The Master of the Rolls*, which had been confirmed on appeal.

Robert Gregge Hopwood, Esq., by his will, dated 29th

that the burthen of proof is on the other side to show that they were not educated in the Protestant religion. But it appears to me, that they were educated in the Protestant religion, so far as it was possible that they should be so educated. There is no reason to suppose that any of them were other than Protestants up to the time when they attained twenty-one. After that, one of the young ladies, having married a Roman Catholic, abjured the Protestant religion and became a Roman Catholic; but that does not show that she was not educated in the Protestant religion. There is evidence that one of them was confirmed at *St. George's*. As to all of them, Protestant services were performed so far as it was possible that they should be performed; and as to the two young ladies particularly, the evidence goes to show that they were rather regular attendants at church while living in the north of *England*. And for all intents and purposes, if the burthen of proof had been upon them to show that they were educated in the Protestant religion, I am inclined to think that the affirmative is made out. That the negative, namely, that they were not educated in the Protestant religion, is not made out, appears to me abundantly clear. I concur, therefore, with my noble and learned friend, that the decree must be affirmed, and that the appeal should be dismissed with costs.

Lord Kingsdown :

My Lords, I entirely concur in the propriety of the decision that the decree below should be affirmed.

Decree appealed from affirmed, and appeal dismissed, with costs.

Lords' Journals, 10th August 1859.

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the trustees should, with that interest, keep on foot certain policies of assurance therein mentioned, and pay the surplus to the husband and wife for life.

On the 19th *February*, 1850, the testator executed a second codicil, in which, after reciting the provisions in his will as to the 5,000*l.* for each of his two sons, he directed his trustees to raise "two farther sums of 7,000*l.* each," one of which sums should be held by them in trust for *Hervey* absolutely as in the will declared of and concerning the legacy of 5,000*l.*, and the other in the same manner for *Frank*, as in the will declared "of and concerning his said legacy of 5,000*l.* thereby given and bequeathed for his benefit;" and he directed his trustees to raise the legacies therein contained by the same means as directed in the will of and concerning the portions or legacies thereby given and bequeathed; and he thereby ratified and confirmed his will and first codicil, except as thereby altered.

On the 16th *April*, 1851, the testator made a third codicil, by which, reciting that he had, since the date of the second codicil, raised the sum of 5,000*l.*, with which he had purchased for his son *Hervey* a lieutenant-colonelcy in the Guards, and which sum might remain a charge on his property at his death, he declared it to be his intention that the sum of 5,000*l.* so invested in such purchase should be accepted by his said son in satisfaction of the legacy of 5,000*l.* given in the will, and he thereby revoked and cancelled that legacy. In all other respects, he ratified and confirmed his will and the two codicils.

The testator died in *July*, 1854. The executors duly paid to the Respondent the amounts stated in the will and codicil, with interest, but the Respondent claimed, as a debt, the amount secured by the settlement. The Appellant, the testator's eldest son, on whose estate this claim was a

charge, filed his bill in Chancery on the 29th *December*, 1856, praying that the Respondent might be ordered to pay the sum of 5,000 *l.* and interest to the trustees of the settlement, and for general relief.

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The Respondent put in his answer, and on the 23rd *July*, 1856, the cause was heard. The *Master of the Rolls* made a decree, by which it was declared that the legacy under the will was not adeemed by the covenant in the settlement, but that the Respondent was entitled to the benefit of both (*a*). This decree was taken by appeal to the Lords Justices. Their Lordships did not agree in opinion. Lord Justice *Knight Bruce* sustained the opinion of the *Master of the Rolls*. Lord Justice *Turner* intimated a different opinion. The original decree stood affirmed (*b*). The present appeal was then brought.

The Attorney-General (Sir *R. Bethell*) and Mr. *Karslake* for the Appellant:

The first mistake of the *Master of the Rolls* in this case was that he treated the whole testamentary disposition as if it had been posterior to the covenant (*c*); whereas, in fact, the codicil thus relied on as showing addition and contradicting ademption, was made the year before the advance to *Hervey Hopwood*, and therefore could not supply the argument which the *Master of the Rolls* drew from it.

The *presumptio juris* in a case of this kind is against double portions; no doubt that is capable of being rebutted by evidence, but the evidence to rebut it must be clear and undoubted. The general nature of the disposition of the property must here be looked at, and that shows no intention of the testator to create this added charge on the estate.

(*a*) 22 Beav. 488.

(*b*) 26 Law Jour. Chan. 292.

(*c*) 22 Beav. 492, 494.

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In the first place, it is clear that the testator intended to put all the younger children on an equality, and his codicil in 1834 shows that he thought what he paid during his life was a satisfaction of what he had at first directed to be paid after his death. Of course the testator could not speak in the same terms of a sum covenanted to be paid, and of a sum which had been actually paid, and that accounts for the difference of expression in the two codicils as to the money paid to his daughter *Mary* and for his son *Hervey*, and as to the money which was to be paid for his son *Frank*; but the intention as to all three was the same.

To give the same sum for the same purpose is always presumed to be an ademption. This presumption of law requires strong evidence to rebut it, or it will prevail. In *Finch v. Finch* (*d*), a mother made an agreement with her son that she would leave him her estate in fee, and that he should, when in possession, pay his sister 20,000*l.* as her portion. The agreement was not executed, but the mother left the estate chargeable with 20,000*l.* for her daughter; it was held that the legacy was a satisfaction of the daughter's interest under the agreement. In *Hinchcliffe v. Hinchcliffe* (*e*), portions given by the parent in a will were presumed a satisfaction of a prior provision made for the same purpose in a settlement. The same rule was adopted in *Sparkes v. Cator* (*f*), and it was added, that slight circumstances of difference, which would repel the presumption of satisfaction between strangers, are not sufficient for that purpose between parent and child. If the provisions are substantially the same, an ademption is established, *Weall v. Rice* (*g*). No doubt the 5,000*l.* constituted, as the *Master of the Rolls* said, a subsisting

(*d*) 1 Ves. Jun. 534.

(*e*) 3 Ves. 516.

(*f*) 3 Ves. 530.

(*g*) 2 Russ. & Myl. 251.

legacy, but it only did so until it was paid under the contract in the covenant.

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The republication of the will by the codicil had not the effect here contended for. In *Powys v. Mansfield* (*h*), it was held that a codicil republishing a will does not make the will speak as from the date of the codicil, for the purpose of reviving a legacy which has been revoked, adeemed, or satisfied. That was clearly laid down by Lord *Cottenham*, who in so stating the rule followed the cases of *Drinkwater v. Falconer* (*i*), *Monck v. Monck* (*j*), (when it was said that a codicil ratifying a will does not set up an adeemed legacy), and *Booker v. Allen* (*k*), all which had, in fact, adopted the principle stated in *Irod v. Hurst* (*l*). Under the provisions of the Wills Act, the codicil confirms the will, and gives it the same operation as if it had been executed at the date of the codicil, *Winter v. Winter* (*m*). That renders the judgment of Lord Justice *Knight Bruce* impossible to be maintained. The word "farther," so much relied on in the Court below, is therefore the only difficulty that remains. That word only means "a sum farther than that which I have in fact given." Here the testator had in fact given by the settlement the sum of 5,000 *l.* mentioned in the will, and the two instruments referred but to one sum.

Mr. *R. Palmer* and Mr. *Little* for the Respondent:

Intention must govern here, and the facts clearly show what was the intention of the testator. First, there is a will giving to the younger children legacies by way of portions to the amount of 5,000 *l.* each. Secondly, as to one of these children, a son, the father, upon that son's

(*h*) 3 Myl. & Cr. 359.

(*i*) 2 Ves. 622.

(*j*) 1 Ball & B. 298.

(*k*) 2 Russ. & Myl. 270.

(*l*) 2 Free. 224.

(*m*) 5 Hare 306.

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marriage, enters into a covenant to the trustees in strict settlement, to pay to the husband, wife, and children a sum of 5,000 *l.*, with interest in the meantime till that sum is discharged. Thirdly, the father, after making this settlement, recognises the gift made by the will by making a codicil, and adding to it 7,000 *l.* more; and fourthly, there are two other codicils in which, with respect to other children, the payment or part payment of the sum originally given is expressly declared to be in satisfaction of the gift, but there is no such declaration with respect to the gift to this Respondent. This last circumstance is very strong to show what was the intention of the testator.

The case of *Irod v. Hurst* (*n*) is the first of those where a testamentary bounty was held to be satisfied by a gift *inter vivos*. That was followed by *Hartop v. Whitmore* (*o*), *Upton v. Prince* (*p*), *Ellison v. Cookson* (*q*), *Trimmer v. Bayne* (*r*), *Hartopp v. Hartopp* (*s*), *ex parte Pye* (*t*), *Monck v. Monck* (*u*), *Platt v. Platt* (*v*), *Booker v. Allen* (*w*), *Lloyd v. Harvey* (*x*), *Durham v. Wharton* (*y*), *Poncy v. Mansfield* (*z*). From these various cases three rules may be deduced: first, that the question is always one of intention, the presumption of law being, no doubt, adverse to the intention to leave double portions, but that presumption will yield to evidence of such an intention having existed; secondly, that in cases of this class, the presumption is repelled by a settlement made after the will in a different course of enjoyment from that created by the will; and

(*n*) 2 Freem. 224.

(*o*) 1 P. Wms. 681.

(*p*) Cas. Temp. Talb. 71.

(*q*) 3 Bro. C. C. 61; 2 Cox,
220; 1 Ves. J. 100.

(*r*) 7 Ves. 508.

(*s*) 17 Ves. 184.

(*t*) 18 Ves. 140.

(*u*) 1 Ball & B. 298.

(*v*) 3 Sim. 503.

(*w*) 2 Russ. & Myl. 270.

(*x*) Id. 310.

(*y*) 3 Clark & Fin. 146.

(*z*) 3 Myl. & Cr. 359; 6 Sim.
528.

thirdly, it may be admitted that in such a case the presumption is not repelled by the mere execution of a subsequent codicil, which in general terms repeats the will.

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The cases which range themselves under another head, namely, that a charge previously created in favour of a child is satisfied by a testamentary gift, are these: *Copley v. Copley* (a), *Hinchcliffe v. Hinchcliffe* (b), *Sparkes v. Cator* (c), *Pole v. Somers* (d), *Weall v. Rice* (e), and perhaps to these may be added *Finch v. Finch* (f). The rule to be deduced from them is, that where, on the whole of the will, there is good ground for believing that the testator intended to satisfy his obligation by his testamentary provision, that intention will prevail, and such intention will be presumed, notwithstanding a trifling difference in the mode of enjoyment under the two titles. But this rule will not extend to cases where the properties would be put in a totally different mode of enjoyment. Now apply these rules. It may be admitted that if there was here nothing more than the will and the settlement, the latter would have been a satisfaction of the former. But here are the codicils, which refer to a different state of facts, and which in the case of one son expressly make an advantage given to him an ademption of the legacy, while, in the case of the other son, they make no reference to any such purpose. In *Hartop v. Whitmore* (g) the doctrine of presumption was relied on as if incapable of being rebutted. That was a mistake, and the case can have no application here. In *Ellison v. Cookson* (h), Lord Thurlow states the foundation of the rule at length, and shows that he considered the

(a) 1 P. Wms. 147.

(b) 3 Ves. 516.

(c) 3 Ves. 530.

(d) 6 Ves. 309.

(e) 2 Russ. & Myl. 251.

(f) 1 Ves. J. 534.

(g) 1 P. Wms. 681.

(h) 1 Ves. J. 100, 107.

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fact of referring to the will after making the settlement amounted to saying that the will had not been satisfied. All the cases in which the gift by the will has been treated as satisfied, are those where the evidence showed that to be the intention of the testator; the mere presumption of law has never been deemed sufficient for that purpose, except, perhaps, in the case of *Hartop v. Whitmore*, the authority of which was questioned by Lord *Thurlow* in *Ellison v. Cookson* (i). Even *Upton v. Prince* (j) is subject to this remark. *Wood v. Bryant* (k) and *Chave v. Farrant* (l) were cases where ademption was established in like manner; but then the father was in each case a debtor, and his gift by will was held to be made in satisfaction of his debt. But then comes the case of *Hall v. Hill* (m) which was very fully considered by Lord Chancellor *Sugden*. There the father, upon the marriage of his daughter, executed to the intended husband his bond, with a warrant of attorney for the payment of 800 l. by instalments, a part during his own life and the residue at his demise. By his will he bequeathed to his daughter a legacy of 800 l., and it was held that this legacy was not a satisfaction of the debt to the husband, and parol evidence to show that it was so intended was rejected.

Then what is the evidence here? There is a gift of 5,000 l. by the will; there is a gift of a "farther sum of 7,000 l." by the codicil. It cannot be pretended that, under the will and codicils, the trustees are not entitled to raise a sum of 12,000 l. to make good these gifts. Then there is a covenant to pay 5,000 l. to the uses of the settlement. That is a benefit totally distinct from that which

(i) 1 Ves. J. 104.


(j) Cas. Temp. Talb. 71.

(k) 3 Atk. 521.

(l) 18 Ves. 8.

(m) 1 Dru. & War. 94.

April, 1829, devised his real and personal estates to trustees, on trust (among other things) to raise the sum of 5,000 *l.* a piece for his two younger sons, *Frank* and *Hervey*, and his daughter *Mary*, “for their portions,” on attaining twenty-one, with interest, from the time of his decease to the time of payment; and in case his son *Frank* should not at the time of his decease have taken a bachelor’s degree at the university, and should not then have attained twenty-four, to raise, “in addition to the interest of his portion,” 50 *l.* per annum till one of those events should happen; and to raise, “in addition to the portion,” such a sum for his son *Hervey* as would purchase a cornet’s or ensign’s commission; and if before his said son attained twenty-one he should be desirous, and an opportunity should offer of purchasing a lieutenant’s commission, they should raise so much of the 5,000 *l.* as should be necessary for that purpose, the interest on the sum so raised to be no longer payable.

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On the 7th *July*, 1834, the testator made a codicil, by which he revoked that part of his will which gave his daughter *Mary* the sum of 5,000 *l.*, he having, on her marriage with Lord *Molyneux*, paid into the hands of his lordship the sum of 2,000 *l.* in part payment of the said portion, and he bequeathed to her the farther sum of 3,000 *l.* to complete his original intention; and he thereby ratified and confirmed his will.

On the 26th *May*, 1835, in contemplation of the marriage of his son *Frank* with Lady *Elinor Mary Stanley*, a settlement was made, by which the testator covenanted that his heirs, executors, &c. should, within twelve months after his decease, pay unto the trustees of the settlement the sum of 5,000 *l.*, and in the meantime he covenanted to pay them 5 *l.* per cent. interest on that sum, and it was agreed among the parties to the settlement that

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adeemed the legacy of 5,000 *l.* given by the will, although his be only a presumption, which may be repelled by evidence given for that purpose.

The testator, by his will, bearing date 29th *April*, 1829, directs his trustees "to raise the sum of 5,000 *l.* a piece for his two sons, *Frank* and *Hervey*, and for his daughter *Mary*, for their portions." The three younger children were thus put upon a footing of equality, and each, as a provision from the father's substance, was to have the sum of 5,000 *l.* This intention is in no degree interfered with by the directions he gives respecting *Frank's* degree and reaching twenty-four, or respecting the purchase of a commission in the army for *Hervey*.

The testator's intention to preserve equality among his younger children is farther shown by his first codicil of 7th *July*, 1834, which he made after paying down 2,000 *l.* on the marriage of his daughter. He thereby "bequeathed to her the farther sum of 3,000 *l.*, to complete his original intention; to be raised and paid in like way as declared regarding his younger children's portions in his will."

Then comes the marriage of *Frank*. On this occasion, the testator does not pay down any part of *Frank's* portion given by the will, but covenants by the settlement, bearing date the 26th *May*, 1835, that "he would, within twelve calendar months after his decease," pay to the trustees of the settlement "the sum of 5,000 *l.*," with interest in the meantime at the rate of 5 *l.* per cent. Notwithstanding a covenant that this interest should be applied in paying the premiums on certain life policies, for the benefit of *Frank* and the Lady *Elinor*, his intended wife, which varies from the bequest of the 5,000 *l.* in the will, it is admitted that the settlement may be presumed to be an ademption or satisfaction of the legacy. Why? Because, merely looking to the will and the testament, the testator obviously

charge, filed his bill in Chancery on the 29th *December*, 1856, praying that the Respondent might be ordered to pay the sum of 5,000 £. and interest to the trustees of the settlement, and for general relief.

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The Respondent put in his answer, and on the 23rd *July*, 1856, the cause was heard. The *Master of the Rolls* made a decree, by which it was declared that the legacy under the will was not adeemed by the covenant in the settlement, but that the Respondent was entitled to the benefit of both (a). This decree was taken by appeal to the Lords Justices. Their Lordships did not agree in opinion. Lord Justice *Knight Bruce* sustained the opinion of the *Master of the Rolls*. Lord Justice *Turner* intimated a different opinion. The original decree stood affirmed (b). The present appeal was then brought.

The Attorney-General (Sir *R. Bethell*) and Mr. *Karslake* for the Appellant:

The first mistake of the *Master of the Rolls* in this case was that he treated the whole testamentary disposition as if it had been posterior to the covenant (c); whereas, in fact, the codicil thus relied on as showing addition and contradicting ademption, was made the year before the advance to *Hervey Hopwood*, and therefore could not supply the argument which the *Master of the Rolls* drew from it.

The *presumptio juris* in a case of this kind is against double portions; no doubt that is capable of being rebutted by evidence, but the evidence to rebut it must be clear and undoubted. The general nature of the disposition of the property must here be looked at, and that shows no intention of the testator to create this added charge on the estate.

(a) 22 Beav. 488.

(b) 26 Law Jour. Chan. 292.

(c) 22 Beav. 492, 494.

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recollection, and he had even forgot the exact contents of the will; for it does not contain trusts for which the two sums of 5,000 *l.* were to be held and applied for the benefit of his two sons, as he supposed. He considers that there is an existing legacy of 5,000 *l.* to his son *Frank*; but this is the legacy which he covenanted should be paid to the trustees of the settlement within twelve months after his decease. The same sum which was given by the revocable will was absolutely secured by the covenant, but still it was the same sum. There ought to be clear language indicating an intention that *Frank* should take a second sum of 5,000 *l.*, but the language of this codicil seems to me, on the contrary, to show that the testator still intended that those two younger sons should have equal portions. The will was an extant will, which professed to give a legacy of 5,000 *l.* to *Frank*; still I can find nothing to indicate an intention to make the will operate by the codicil as conferring an additional gift of 5,000 *l.* Although a codicil confirms a will, and for certain purposes brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if the will had been originally made at the date of the codicil; and there seems to me to be no ground for contending that in this case there is a fresh gift to *Frank* of 5,000 *l.* after the execution of the settlement.

There is only one other document to be considered, namely, the third codicil, dated the 16th *April*, 1851. Between the periods of making the two codicils, the testator had raised 5,000 *l.* by mortgage, and with that money had purchased for his son *Hervey* a lieutenant-colonelcy in the Guards; and he now executes the third codicil to declare that this 5,000 *l.* so applied should be accepted by his son *Hervey* in satisfaction of the legacy of 5,000 *l.* given him by the will. This codicil, coupled with

April, 1829, devised his real and personal estates to trustees, on trust (among other things) to raise the sum of 5,000 *l.* a piece for his two younger sons, *Frank* and *Hervey*, and his daughter *Mary*, “for their portions,” on attaining twenty-one, with interest, from the time of his decease to the time of payment; and in case his son *Frank* should not at the time of his decease have taken a bachelor’s degree at the university, and should not then have attained twenty-four, to raise, “in addition to the interest of his portion,” 50 *l.* per annum till one of those events should happen; and to raise, “in addition to the portion,” such a sum for his son *Hervey* as would purchase a cornet’s or ensign’s commission; and if before his said son attained twenty-one he should be desirous, and an opportunity should offer of purchasing a lieutenant’s commission, they should raise so much of the 5,000 *l.* as should be necessary for that purpose, the interest on the sum so raised to be no longer payable.

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On the 7th *July*, 1834, the testator made a codicil, by which he revoked that part of his will which gave his daughter *Mary* the sum of 5,000 *l.*, he having, on her marriage with Lord *Molyneux*, paid into the hands of his lordship the sum of 2,000 *l.* in part payment of the said portion, and he bequeathed to her the farther sum of 3,000 *l.* to complete his original intention; and he thereby ratified and confirmed his will.

On the 26th *May*, 1835, in contemplation of the marriage of his son *Frank* with Lady *Elinor Mary Stanley*, a settlement was made, by which the testator covenanted that his heirs, executors, &c. should, within twelve months after his decease, pay unto the trustees of the settlement the sum of 5,000 *l.*, and in the meantime he covenanted to pay them 5 *l.* per cent. interest on that sum, and it was agreed among the parties to the settlement that

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I will only add, that the sums of 5,000 *l.* to *Frank* mentioned in the will, in the settlement, and in the second codicil, appear to me to be clearly identical; and that when this sum has been paid under the settlement, it cannot be claimed under the will.

For these reasons, I am of opinion that the decrees appealed from ought to be reversed, with a declaration that the testator intended that only one sum of 5,000 *l.* should be taken by his son *Frank*, and with this declaration that the cause be remitted to the Court of Chancery.

Lord *Cranworth*:

My Lords, it is not disputed that if Mr. *Hopwood*, the father, had died the day after the marriage of his son *Frank*, only one sum of 5,000 *l.* would have been payable. The 5,000 *l.* given by the will was expressly given as a portion. The settlement must have been intended as a settlement of the son's portion, and the rule that the Court inclines against double portions would, according to all the authorities, have prevailed. The 5,000 *l.* brought, or agreed to be brought into settlement, would have been understood to be the same 5,000 *l.* which he had given by the will as *Frank's* portion. The rule, however, is not an unbending one; it yields to an indication of a contrary intention; and the only question is, whether there are to be found in this case circumstances to show that, contrary to the *primâ facie* presumption, the testator intended that his son *Frank* should take the 5,000 *l.* given as a portion by the will in addition to the 5,000 *l.* secured by the settlement. The *Master of the Rolls*, on the original hearing, and Lord Justice *Knight Bruce* on the appeal, were of opinion that the circumstances of the case do disclose an intention on the part of the father to give both sums of 5,000 *l.*

charge, filed his bill in Chancery on the 29th *December*, 1856, praying that the Respondent might be ordered to pay the sum of 5,000 *l.* and interest to the trustees of the settlement, and for general relief.

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The Respondent put in his answer, and on the 23rd *July*, 1856, the cause was heard. The *Master of the Rolls* made a decree, by which it was declared that the legacy under the will was not adeemed by the covenant in the settlement, but that the Respondent was entitled to the benefit of both (*a*). This decree was taken by appeal to the Lords Justices. Their Lordships did not agree in opinion. Lord Justice *Knight Bruce* sustained the opinion of the *Master of the Rolls*. Lord Justice *Turner* intimated a different opinion. The original decree stood affirmed (*b*). The present appeal was then brought.

The Attorney-General (Sir *R. Bethell*) and Mr. *Karslake* for the Appellant :

The first mistake of the *Master of the Rolls* in this case was that he treated the whole testamentary disposition as if it had been posterior to the covenant (*c*); whereas, in fact, the codicil thus relied on as showing addition and contradicting ademption, was made the year before the advance to *Hervey Hopwood*, and therefore could not supply the argument which the *Master of the Rolls* drew from it.

The *presumptio juris* in a case of this kind is against double portions ; no doubt that is capable of being rebutted by evidence, but the evidence to rebut it must be clear and undoubted. The general nature of the disposition of the property must here be looked at, and that shows no intention of the testator to create this added charge on the estate.

(*a*) 22 Beav. 488.

(*b*) 26 Law Jour. Chan. 292.

(*c*) 22 Beav. 492, 494.

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devised certain estates to trustees on trust to raise two sums of 5,000 *l.* each for the benefit of his two sons, *Frank* and *Hervey*. This was strictly true. It was not necessary for him to say in what manner *Frank's* 5,000 *l.* were to be paid. The recital was only necessary as a mode of indicating in what manner the trustees were to dispose of the two farther sums of 7,000 *l.* each, which he then directed them to raise, namely, as to *Frank's* 7,000 *l.* that they should hold it for the benefit of his son *Frank* in the same manner as by the will he had directed concerning the 5,000 *l.* This made it the duty of the trustees to pay the 7,000 *l.* to *Frank* for his own benefit, that having been the mode in which the will had directed the 5,000 *l.* to be applied, though by the covenant that sum of 5,000 *l.* or the 5,000 *l.* substituted for it, was to be applied on different trusts.

With respect to the word “farther,” I cannot attribute to it the force to which the *Master of the Rolls* thought it was entitled. Having naturally, if not necessarily, referred to the clause in the will whereby he had directed his trustees to raise two sums of 5,000 *l.* each for his two sons, the testator could hardly have avoided the use of the word “*farther*,” when he directed two sums of 7,000 *l.* each to be raised, as additional portions, beyond what he originally contemplated. But the question is, to what does the word “*farther*” apply—farther than what? I think it means only farther than what would be raisable under the directions of the will he had recited. This, though it would originally have been 10,000 *l.*, had, by virtue of the covenant, been reduced to 5,000 *l.* I can see nothing in the use of the word “*farther*” which shows what sum the testator considered would be raisable if he had not given the additional portions. It may be added, that the sum of 5,000 *l.* would, at all events, have been payable, though

not under the will; for, if the personal estate was insufficient to satisfy the 5,000 *l.* secured by the covenant, the trustees would have been bound by their trust to raise it before they could raise the legacies.

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On these grounds I feel bound to say, that I am unable to concur with the *Master of the Rolls* in the reasoning which led him to the conclusion that the *primâ facie* presumption was rebutted. Lord Justice *Knight Bruce*, though he arrived at the same result with the *Master of the Rolls*, did so on different grounds. He relied mainly on the silence of the testator in the second and third codicils as to the 5,000 *l.* legacy to *Frank*, that is, that he expressed no intention to revoke or adeem it, though he did so as to the sums given to his daughter and to his son *Hervey*. By the first codicil, made after the marriage of his daughter with Lord *Molyneur*, the testator expressly refers to the sum of 2,000 *l.* given to her on that occasion as being to be taken in part discharge of her portion. And by the third codicil he expressly directs that the 5,000 *l.* paid for the purchase of a commission for *Hervey* should be taken as a satisfaction of his 5,000 *l.* The Lord Justice considered that the express reference to the case of the daughter and of his son *Hervey*, and the absence of any such reference in the case of *Frank* showed that, in his case, no ademption was intended.

I do not feel convinced by this reasoning any more than by that of the *Master of the Rolls*. In both the cases referred to by the Lord Justice, the money had actually been paid, and the testator or his advisers may well have considered that (whatever was the rule of the Court) it would be no more than a reasonable precaution to state distinctly what were his intentions, in order to prevent his estate being burthened twice for what he intended to be but one charge on his assets, and to prevent all possible

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doubt which might occasion litigation. With respect to the daughter, the codicil was a reasonable precaution on another ground; that is, to prevent the possible inference that the advance of the 2,000 *l.* might operate as satisfaction or discharge of the whole legacy of 5,000 *l.* For the case of *Pym v. Lockyer* was not decided till several years after the date of the first codicil.

But the case of *Frank* stood on very different ground; nothing had been paid to him. The testator's covenant was in substance a mere covenant that his executors should pay to the trustees of *Frank's* settlement 5,000 *l.*, which I assume to be considered to be the very 5,000 *l.* given to him by the will. This, it is admitted, would have been its practical effect if no codicils had existed. And if that was understood by him to be its effect, I can discover no reason why he should have thought it necessary to make allusion to it in either of the codicils executed after the date of the settlement. The testator knew that two sums of 5,000 *l.* each were to be paid at his death out of his estate, and the circumstance that one of them was to be paid by virtue of his covenant and not of his will, was a matter which would not naturally occur to him as necessary to be alluded to by a codicil.

On these short grounds I have come to the conclusion in agreement with what I must understand to have been the opinion of Lord Justice *Turner*, that the covenant discharged all obligation under the will so far as related to the 5,000 *l.*, and so that this appeal ought to be allowed.

Lord *Kingsdown*:

My Lords, as my noble and learned friends who have addressed the House concur in opinion that this decree must be reversed, and as that therefore must necessarily

be the judgment of the House, I do not think that I should have considered it necessary, or indeed advisable to address your Lordships, if I were not anxious to correct an erroneous opinion which I entertained, and I believe intimated in the course of the argument in this case.

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At the hearing of this case I was under the impression that a settlement made by a parent upon a child would not operate as a satisfaction or ademption of a portion given by a previous will, unless and until the portion provided by the settlement was actually paid; and that, therefore, when (as in this case) the settlement was by covenant to pay at the testator's death, both the legacy and the covenant were alike in existence during the testator's life, and that the legacy would not be satisfied or adeemed till his death. If this view had been correct, the testator, by his second codicil, would have properly spoken of the 5,000 *l.* given by his will as a subsisting legacy, and it would not have affected the construction of the instrument: if he had expressly confirmed it, he would have confirmed it only subject to its liability to be applied in satisfaction of the covenant.

But upon farther consideration, and on examination of the cases, I am satisfied that this view cannot be maintained either upon principle or authority. The principle seems to be, that when a parent has given a portion by a will, and afterwards pays or secures the same portion by a settlement, the legacy is from that moment gone, and the will is to be read as if that bequest had been expunged from it. The language of Lord *Cottenham*, in *Powys v. Mansfield* (o) upon this point is, I think, quite borne out by the cases. "The codicil" (he says) "can only act upon

(o) 3 Mylne & Cr. 359, 375.

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the will as it existed at the time, and at the time the legacy revoked adeemed, or satisfied, formed no part of it."

Then as to settlement being equivalent to payment. When the father has provided for the child in a different form the portion which he intends him to take, he has as much indicated an intention that he should not also take the legacy as if he had paid the portion to trustees. It is not merely that the child shall not take *both*, he has no option *which* he shall take. The father is held to have substituted the provision by deed for the provision by will, and from that time the legacy is at an end. It is not necessary that the legacy should be *paid* in order that it may be adeemed. It is sufficient if the testator has done that which, in the opinion of the Court, shows an intention that it should not be paid. It can hardly make any difference whether a testator pays, or secures to be paid, the amount of the portion.

In the cases found in the books, the term "advance-ment" is generally used, and I cannot find that in any case a distinction has been taken between payment and securing to be paid. There is an allusion to the distinction by Lord *Hardwicke* in *Spinks v. Robins* (*p*), but it is with reference to a case where the promise to pay was on a contingency. When the engagement to pay is absolute, it seems to be for this purpose equivalent to payment. But here it is admitted that, taken alone, the settlement was a satisfaction or ademption of the legacy; and the only question is, at what time it produced that effect. I think it impossible to say that the effect, if produced at all, was not produced when the testator executed the settlement. He then, if at all, declared his intention that the legacy given by the will should not be paid.

If this be so, the second codicil must be read as applying

(*p*) 2 Atk. 491.

to a will in which the legacy of 5,000 *l* must be considered as revoked, or rather in which an intention to revoke must be presumed. And the question then is, whether the codicil does or does not show an intention on the part of the testator to treat that legacy, which the law would have presumed an intention on his part to revoke by means of the settlement, as a legacy still subsisting, and which he intended to be paid, and whether, therefore, the presumed intention to revoke is not repelled. I confess I find it difficult to put any other interpretation on his words, “whereas I have given 5,000 *l* by my will, I give a farther sum of 7,000 *l* by this codicil.” It seems to me to be the same thing as, “I give 7,000 *l* by my codicil in addition to the 5,000 *l* given by my will.”

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Nor does it seem to me that the previous and subsequent codicils are altogether immaterial. The first seems to show that the testator did not consider the advance of 2,000 *l* on his daughter's marriage as a satisfaction *pro tanto* of her legacy; and the third that he did not think the advancement for his son *Hervey* would have that effect with respect to his legacy.

But as the construction to be put upon these instruments, though all important to the parties in this case, involves no general principle of law, and, as having communicated with my noble and learned friends on this subject, I find that they are satisfied that there is not sufficient in this case to repel the presumption of revocation, I do not think it would be useful to pursue the subject farther.

The following Order was made :—That the said decree or decretal order of the *Master of the Rolls*, of the 24th of *July* 1856, and the said decree or decretal order of the Lords Justices of the Court of Appeal in Chancery, of the 17th of *February* 1857, respectively complained of in the

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said appeal, be, and the same are hereby reversed : and it is hereby declared that only one sum of 5,000 *l.* was payable under the will and under the settlement, on the marriage of the Respondent *Frank George Hopwood*. The money paid to the Respondent in respect of the legacy (the money payable under the settlement having been also paid), is ordered to be repaid, with costs, under the decrees reversed ; and the cause is remitted to the Court of Chancery to do therein as shall be consistent with this judgment.

Lords' Journals, 10th *August* 1859.

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 11, 12, 14.

Trustee and
 Solicitor.
 Security.
 Fraud.
 Misrepresentation.
 Pleading.
 Bill.
 Evidence.

GEORGE SMITH - - - - *Appellant.*
 WILLIAM KAY - - - - *Respondent.*

In a bill to set aside securities the Petitioner alleged that when he executed the securities he "was led by the Defendant to believe, and did in fact believe, that the Defendant had become possessed of the bills for the amount of which such securities were given to him," in a certain manner which was not the true manner ; and "under the circumstances aforesaid, the execution of the sureties was obtained by fraud and misrepresentation, or concealment of the real facts" :

Held, that whatever objections might have been raised on demurrer to the sufficiency of this mode of allegation, it was too late after evidence and hearing to raise any.

Qu. (by Lord *Cranworth*) whether under the authority of *Williams v. Lord Jersey* (Craig & Phil. 91), such an allegation would not have been sufficient even on demurrer.

When a party has practised a deception with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality. The *onus probandi* that the end was not so attained lies on the party who used the deception.

A security given for the payment of a bill, which has existence only through a fraud, cannot be made available by the supposed holder of the bill, though he may be untainted by the fraud to which it

owes its origin, but he must rely on the bill alone, and can derive no benefit from the fraudulent security.

If a bill in equity is supported only by the testimony of a single witness, and is positively, clearly, and precisely denied by the Defendant, it will be dismissed : *secus*, if it is corroborated by letters of the Defendant or other sufficient evidence.

Representations inducing a person to enter into a particular contract, though not made at the moment the contract is actually entered into, constitute, if fraudulently made, *dolus dans locum contractui*. *dub.* Lord *Wensleydale*.

The jurisdiction of Courts of Equity will be employed to protect infants, and is not confined to cases where there has been an abuse of a strictly fiduciary character. The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed. In the former influence is presumed, in the latter its existence must be proved.

Observations on the moral duties of a defrauded person.

THIS was an Appeal against a Decree of the *Master of the Rolls* (a).

Kay was a young man of fortune. *Smith* was an attorney and solicitor. *Kay* succeeded under his father's will to a life interest in real estate, amounting to above 6,000 *l.* a year, and to above 120,000 *l.* in the funds. He came of age on the 11th of *April* 1854. During the last two years of his minority, he had been acquainted with a person named *Johnston*, and had indulged in habits of reckless extravagance. His immediate wants were supplied by *Johnston* from the produce of bills which he accepted to the amount of more than 53,000 *l.* He believed that these bills had been discounted by various persons through the intervention of *Johnston*; in fact most of them were in the hands of *Johnston*. As *April* 1854 approached, he was advised by that person to buy them up. *Johnston*, who had previously been introduced by *Smith* to *Adams*, introduced *Adams* to *Kay* as a person who would buy up the bills if he

(a) 21 Beav. 522.

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was made secure of their being paid on *Kay* coming of age. *Kay*, on the 1st *April* 1854, wrote a letter to *Adams*, on the subject of his getting in the bills, and made a promise to that effect.

Kay was informed that his wishes had been complied with, and that *Adams* had bought up most of the bills, but that some to the amount of about 12,000 *l.* were in the hands of *Smith*, who had bought them up at the request of *Adams*, as *Adams* was alarmed at the idea of being a holder to such a large amount. In this way *Smith* also was introduced by *Johnston* to *Kay*. On the 12th *April* 1854, the day after *Kay* became of age, a meeting of these parties took place, no solicitor or friend was there on the part of *Kay*, but *Smith* produced some deeds which he had previously prepared, and *Kay* executed them. Among these were a bond to the amount of 12,594 *l.* and an assignment of some life policies, which securities were executed by *Kay* in favour of *Smith*. On the 7th *November* 1854 *Kay* filed a bill against *Smith*, setting forth the transactions between himself and *Smith*, and the persons named *Johnston* and *Adams*, and praying that the bond and the securities executed by him, *Kay*, on the 12th *April* 1854, ought to stand only for so much money as had been actually paid by *Smith* for several bills of exchange got in by him, together with interest at five per cent., that an account might be directed, that an injunction might issue to stay an action then brought on these securities, and for farther relief. On this bill proceedings took place in the Court of Chancery. The parties gave evidence before the examiners, and the injunction was granted and was ordered to be continued till the cause should be heard.

On the 13th *June* 1855, *Kay* filed an amended bill. This amended bill set forth the circumstances of the dealings between *Johnston*, *Adams*, *Smith*, and *Kay*, in rela-

tion to the bills of exchange to secure payment of which the bond and securities in question had been given; and paragraph 44 alleged as follows:—"If the Defendant did, in fact, discount and give full consideration for the bills for the amount of which such securities were given to him as aforesaid (which the Plaintiff does not admit to have been the case), still the Plaintiff submits that the Defendant is not entitled, as against the Plaintiff, to the benefit of such securities; for the Plaintiff shows, that when he executed the same, he had not been informed, and he did not know that the Defendant had ever discounted any of the bills accepted by the Plaintiff as aforesaid, and when he executed the said securities he was led by the Defendant to believe, and he did in fact believe, that the Defendant had become possessed of the bills for the amount of which such securities were given to him as aforesaid, in the manner hereinbefore mentioned, pursuant to or in consequence of the application which the Plaintiff made to the said *Samuel Adams* to take up or get in the said bills." The 46th paragraph was in these terms:—"Under the circumstances aforesaid, the Plaintiff submits that the execution of the securities, so as aforesaid given by him to the Defendant, was obtained by fraud and misrepresentation, or concealment of the real facts, and that the Defendant ought not to have the benefit of such securities against the Plaintiff, and that such securities ought to be delivered up to be cancelled." The prayer of the bill was that the bond and securities might stand for such principal sum only, if any, as *Smith* actually paid for getting in the bills, with five per cent. interest; that an account might be taken; that if it should appear that *Smith* did not pay any sum, that the bond and securities might be cancelled; that on payment of whatever should be found due certain policies of assurance should be delivered up; that *Smith*

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should be restrained from proceeding at law against him, and for farther relief.

The cause having been heard before the *Master of the Rolls*, his Honour, on the 29th *February* 1856, pronounced a decree by which it was declared that the bonds and securities, dated 12th *April* 1854, were void as against the Respondent; a perpetual injunction against proceeding at law on these securities, or on the bills, was ordered, and it was likewise, by consent, ordered, that *Smith* should be at liberty to attend the taking of the accounts in the case of *Kay v. Johnston* (b), which was then pending in Chancery, for the purpose of establishing his claims (if any) against such balance (if any) as might be found due from them to *Johnston*, and *Smith* was ordered to pay *Kay's* costs.

This was the decree appealed against.

The Attorney-General (Sir *F. Kelly*) and Mr. *Rolt* (Mr. *Jessel* was with them) for the Appellant:

The Bill is defective. It does not allege a case of fraud and misrepresentation such as to justify the interference of a Court of Equity. The allegation that the Plaintiff was "led to believe" that the Defendant had not discounted the bills, but had purchased them up or got them in from third parties, is too vague to be answered either in pleading or in proof. There is nothing to show that the Appellant was party or privy to the means by which the Respondent was "led to believe," nor are the allegations in the amended bill sufficient to allow proof that the Appellant was party or privy to such means. There is no fraud here alleged or proved in the making of the contract, but to justify the decree there ought to be fraud *dans locum contractui*.

Some of the evidence, consisting of letters, especially one of the 1st of *April* 1854, from *Adams* to *Kay*, was,

(b) 21 Beav. 536.

... improperly admitted ; but even if properly admitted it was not sufficient to justify the decree. The Respondent knew all along that the Appellant had originally discounted the bills ; but even if he did not, he was not bound by a mistaken belief on that point to execute the decrees, there was no reference to that at the time of their execution. Of course he would have executed them if he had known that the Appellant had originally discounted the bills, then, as in buying them up, the Appellant would be liable to the amount advanced. In any view of the matter the Respondent's belief on this matter was immaterial. The Appellant here was not the guardian or the trustee of the Respondent, and the rules applicable to transactions between such parties must not be applied in this case. In all events, if in equity the Respondent is entitled to the securities set aside, it can only be upon payment of what is actually due, with five per cent. interest. Lastly, the decree is erroneous in restraining the Respondent from suing on the bills of exchange, the bill not containing a prayer to that effect, and there being no evidence in the evidence to justify the imposition of such a restraint on the Appellant. They cited *Hicks v. Sallitt* (c), *Edge v. Moss* (d), *Irving v. Kirkpatrick* (e), *The Royal Exchange Company v. Drew* (f), *Wilde v. Gibbons* (g), *Evans v. Bicknell* (h), *Adamson v. Evitt* (i), *Harris v. Price* (j), *Price v. Berrington* (k), *Pasley v. Freeman* (l), *Finch v. Finch* (m), *Fell v. Gwydyr* (n), *Pulsford v. Pulsford* (o), *Shedden v. Patrick* (p).

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De G. M. & Gord. 782.	(j) 1 Exch. 122.
Jur. N. S. 58.	(k) 3 Macn. & Gord. 486.
Bell's Sc. App. Cas.	(l) 2 Smith Leading Cas. 62.
Mac Queen's Sc. App.	(m) 5 H. L. Cas. 905.
	(n) 1 Si. 63.
H. L. Cas. 605, 620.	(o) 17 Beav. 87.
Ves. 174—183.	(p) 1 Macq. Sc. App. Cas. 535.
Russ. & Myl. 70.	

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Mr. *Roundell Palmer* and Mr. *Dickinson*, for the Respondent :

The bill sufficiently alleges a case of misrepresentation and fraud, and there is no part of the evidence which was improperly admitted, and which does not sustain the charge in the bill. The Appellant knew what representations had been made to the Respondent; he had himself arranged the making of some of them, and he took advantage of the Respondent's belief in those representations, which he himself well knew to be false, in order to obtain these securities. Immediately after the Respondent had attained his full age, and when he had no legal adviser, except the Appellant himself, were these securities obtained. The whole transaction was tainted with fraud, and the Appellant was well aware of its true nature, did not disclose to the Respondent, and thereby obtained an advantage which a Court of Equity will not allow him to retain. It is not merely against guardians and solicitors properly so called, that a Court of Equity will protect infants; such protection will be afforded when other persons older and more capable than themselves have abused the simplicity and confidence of unprotected persons. The cases of *Bridgman v. Green* (*q*), *Hugenuin v. Basely* (*r*) *Cooke v. Lamotte* (*s*), *Savery v. King* (*t*), *Williams v. Lord Jersey* (*u*), *Malcolm v. Scott* (*v*), *McMahon v. Burdett* (*w*), *Attwood v. Small* (*x*), *Reynell v. Sprye* (*y*), *Chesterfield v. Janssen* (*z*) were cited.

The *Attorney-General* replied.

(*q*) 2 Ves. 627; Wilm. 58.
 (*r*) 14 Ves. 273, 284.
 (*s*) 15 Beav. 234.
 (*t*) 5 H. L. Cas. 627.
 (*u*) Cr. & Phil. 91.

(*v*) 3 Hare, 39.
 (*w*) 2 Phill. 127.
 (*x*) 6 Clark & F. 232.
 (*y*) 1 De G. Mac. & Gord. 600.
 (*z*) 2 Ves. 125.

The Lord Chancellor (Lord *Chelmsford*):

My Lords, this is an appeal from a decree of the *Master of the Rolls*, declaring that a bond for 12,594*l.*, and an indenture of assignment of policies of assurance on the life of the Respondent, executed the day after he came of age, to secure payment to the Appellant of several bills of exchange, accepted by the Respondent during his minority, were void as against the Respondent, on the ground of their having been obtained from him through fraud and misrepresentation.

The objections which have been raised against the decree may be considered under three general heads. *First*, that the bill does not state with sufficient certainty any case of fraud. *Second*, that the misrepresentation which is alleged is immaterial, as it did not give occasion to the securities. *Third*, that if the bill states a case of fraud, the particular fraud alleged is not proved.

Upon the first objection it will be necessary shortly to consider the case which is made by the bill (*a*).

The Appellant has contended before your Lordships, that these statements in the bill amount to no case of fraud against him, and he has cited various authorities to prove that where fraud is the foundation of a bill for relief, it must be clearly and distinctly averred. My Lords, it is unnecessary to consider these cases, because the general principle which they establish is not disputed. And the only question is, whether it is applicable to the present case. Now it must be admitted that the bill might have been framed with more clearness and precision, and that it ought to have pointed more distinctly to the grounds

(*a*) His lordship stated it fully, but as the judgment of the *Master of the Rolls* on the facts was unanimously affirmed, this report is confined to the points of law now first presented for consideration.

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upon which the Appellant's securities were to be impeached. Whether the allegation that "the Plaintiff was led by the Defendant to believe that he had become possessed of the bills for the amount of which such securities were given in the manner before mentioned," which constitutes the whole of the charge against the Defendant, would have been sufficient upon demurrer to the bill, it is unnecessary to determine, for I think that it is much too late for the Appellant now to urge any such objection. He put in his answer to the bill, and replied to its various allegations; he had the fullest information of the case to be made against him from the Plaintiff's affidavit, and he answered it by his own affidavit, fully and particularly; and it never occurred to him, till he appeared at your Lordships' bar, that he had any pretence for asserting that the case against him was imperfectly stated, or that he was not aware of the specific grounds upon which his securities were to be invalidated. I do not say that this objection would have been successful if it had been made at an earlier stage of the proceedings, but at all events it cannot prevail now, that it is for the first time urged, upon the appeal from the decree.

The bill, therefore, being taken to contain a sufficient statement of a case against *Smith*, the next objection which he makes is, that the misrepresentation which is alleged, if proved, is immaterial, as it could not have been the cause of the securities being given. And he says that the only point which could vitiate the securities, would be a fraud *dans locum contractui*, that is, such a fraud as occasioned the contract.

The misrepresentation which is alleged against *Smith* is, that having obtained possession of some of the bills of exchange accepted by *Kay*, by discounting them with *Johnston*, he pretended that he had received them from

Adams after they were got in by him as represented, and that *Kay* executed the securities under the false impression thus produced upon his mind. Now it is contended that this representation is wholly immaterial, that it was perfectly indifferent to *Kay* in what manner *Smith* became the holder of the bills, provided he gave consideration for them, and that if *Kay* had been told the whole truth, he would equally have been willing to give the securities. But can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth? How is it possible to say in what manner the disclosure would have operated upon *Kay's* mind, that he had been the dupe of a scheme of deception, which up to that moment had been successful in inducing him to believe that *Adams* had befriended him in taking up the bills, and that *Smith* had kindly co-operated with him. For my part, I think that the Appellant takes too sanguine a view of probabilities when he assumes that the discovery that *Johnston* was, after all, the holder of the greater part of the bills, would still have left *Kay* in the same mind to ratify the transaction, as he was brought into by the misrepresentations which were designedly made to him.

But the Respondent's case hardly wants the aid of the particular misrepresentation imputed to the Appellant, because it appears to me that, if the securities were given entirely in consequence of the fraud of *Johnston*, either alone or in concert with *Adams*, although *Smith* was not an immediate party to the fraud by which they were obtained, he could not, under the circumstances of the case, maintain any right in them, according to the case of *Bridgman v. Green* and other similar cases which have been cited in the argument. For I have no difficulty in

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saying, as to the case supposed by the *Attorney-General*, of a party, the *bonâ fide* holder for value of a bill of exchange for whom a security is obtained by the fraud of a third person of which he is himself innocent, that a security of this description, which has existence only through a fraud, cannot be made available by the supposed holder of the bill, however he may be untainted by the fraud to which it owes its origin, and that he must rely upon the bill alone, and can derive no benefit from the fraudulent security.

I therefore pass to the third objection which the Appellant sets up to the decree, viz., that there is no evidence to establish against *Smith* the particular fraud which is alleged in the Bill. I may notice, in passing, an objection which was made by him, that certain letters which have been used to implicate him in the transactions of *Johnston* and *Adams* with *Kay*, are not set out in the bill so as to give him notice of them. But it is not the office of the bill to do more than to state, with sufficient clearness and precision, the grounds upon which relief is sought in equity; it ought not to show by what evidence the case alleged is to be established.

In considering the evidence it will be unnecessary to depart upon this occasion from the principle which we have been reminded has been long settled in equity, that if the bill is supported by the testimony of a single witness only, and the Defendant, by his answer, positively, clearly, and precisely denies the allegations it contains, the Court will not make a decree, but will dismiss the bill. This rule is very clearly stated by my noble and learned friend, Lord *Cranworth*, in *Jordan v. Money* (b). But a qualification of this rule of evidence equally well

(b) 5 H. L. Cas. 185.

established is, that if the testimony of the one witness is corroborated either by the letters of the Defendant, or by other circumstances, that will be sufficient to turn the balance so as to produce preponderating evidence upon which the Court can act. And this corroboration appears to me to be abundantly supplied in the present case.

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[His Lordship here proceeded with a most elaborate and minute statement of the facts of the case, and declared his entire concurrence with the judgment of the *Master of the Rolls* upon them.]

After this long examination of the circumstances of this case, it is almost unnecessary for me to say, that in my judgment the fraud which is charged upon the Appellant is completely established, and that he must suffer all the consequences of having chosen to unite with others in a scheme of deception which, perhaps, it was unnecessary for him to resort to in order to obtain the confirmation of his own transactions. If this had been nothing more than the case of a young man completely under the control and influence of another person, and, acting under that influence, being induced to execute securities for bills which he had accepted during his minority, without any independent legal advice or assistance to enable him to understand and learn his true position, I should have thought it would be incumbent upon those who endeavoured to avail themselves of those securities, to give the clearest and most satisfactory evidence of fair dealing with him before they could be permitted to maintain them. But the present case goes far beyond that. Omitting altogether the mode in which the bills were obtained from *Kay*, he has been prevailed upon to ratify them, not merely by a concealment of the truth, but by a planned and concerted misrepresentation of the circumstances, contrived and determined upon for the very purpose of entrapping him into the execution of these

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securities. Whether *Smith* was privy from the first to *Johnston's* designs upon *Kay*, to the encouragement which he gave to his extravagance, and to all the contrivances to entangle and retain him in the net with which *Johnston's* baneful influence had surrounded him, is not necessary to be determined. But it is to my mind most clearly and completely established that *Smith* was a consenting and contriving party to a deliberate plan of deception which was practised upon *Kay* for the purpose of inducing him to give the very securities which are impeached by this suit; that the securities followed upon the misrepresentations, and were induced by them, there being nothing to prove that they would otherwise have been given; and that it would, therefore, be contrary to every principle of equity to allow them to stand.

My Lords, I submit that, under all these circumstances, the decree of the *Master of the Rolls* ought to be affirmed.

Lord *Cranworth* :

My Lords, my noble and learned friend has so fully gone into, and I might almost say exhausted, this case, that it is hardly necessary to add anything to what has been already said. I thought it right, however, in a case of such importance, importance in amount, importance in reference to the characters of the parties concerned, and importance in reference to the principles involved, to say a few words, which I shall do, not by again going over the facts of the case, but by stating very shortly a few propositions which I think have been and ought to be, kept in view in deciding this case.

The first objection that was made on the part of the Appellant, or at least one objection which I will deal with first, is an objection to the pleading. It was said that the

fraud complained of is not stated in the bill with that precision which the Court requires. Now, my Lords, I should be very loth indeed to throw any doubt upon what was stated, that a court of equity, as well as a court of law, in suits instituted for the purpose of impeaching transactions for fraud, requires that it should be distinctly stated what that fraud is, so that the parties who have to meet it may know what the charge is, and therefore what the defence, if they have any, ought to be.

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Here the allegation, as pointed out by my noble and learned friend, is, that *Kay* was led by the Defendant to believe, and did, in fact, believe, that the Defendant had possession of the bills, by means of their having been got in from the persons who had discounted them. Now, undoubtedly, that is rather a vague allegation, not, however, I must add, in my opinion, so vague as the allegation in the case of *Williams v. Lord Jersey (b)*, where it was alleged that the Defendant had "encouraged the Plaintiff." Yet, even to that allegation Lord *Cottenham* thought that a demurrer could not be sustained, but that at the hearing such encouragement must be proved as would entitle the party to relief. My Lords, the propriety of that decision is not now in question before your Lordships. All that I would say upon it is, that I think it is a very formidable authority against the possibility of sustaining a demurrer to this bill upon the allegation of the party having been "led to believe."

I see how it was this allegation came to be put in this vague form, namely, that the facts, upon which the equity in the amended bill is founded, had transpired after the answer to the original bill had been put in. In a great measure, the evidence by which it was supported did not

(b) *Craig & Phil.* 91.

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transpire till a long while afterwards. It is very true, that perhaps, in strictness, it would have been better, even a second time, to have amended the bill, and to have stated the charge with a little more precision. But that has become totally immaterial, inasmuch as, from what subsequently followed on the part of the Defendant, it was quite clear that he perfectly well understood what it was that he was charged with, because he showed that he was prepared to answer it. In my opinion, however, acting upon the authority of *Williams v. Lord Jersey*, the bill would not have been demurrable if the case had been as originally stated.

With regard to the authorities that have been relied upon to show that it would have been demurrable, they are clearly distinguishable from the present case; one was a *Scotch* case, but the principle was the same; indeed, the principle must be the same in every system of law in civilized countries. If you charge a person with fraud, you must state in your bill or summons, or whatever it may be, what you mean to charge. In the case of the *National Company v. Drew (c)*, it was sought to impeach the validity of certain deeds, and to reduce certain documents which were sought to be impeached, upon the ground that, according to the language of the parties seeking to impeach them, they had been obtained by a "tissue of falsehoods." It was not necessary, if I recollect rightly, to decide that point in this House, because the decision went upon another ground; but I have no hesitation in saying, that upon that case coming before me, when I had the honour of holding the Great Seal, I did lay it down, and I adhere to it still, that a bill, as it is called in this country, or a summons in *Scotland*, that seeks to set aside or reduce an instrument upon the ground that it has been

obtained by a "tissue of falsehoods," would not do without more. How can the Defendant answer such a charge as that? It is quite possible that he may not know what is meant by it.

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Then the other case was a case before Vice-Chancellor Wood, of *Bainbridge v. Moss* (d). It was a case in which there had been immense litigation between the heir at law and certain devisees claiming under the will, a litigation which had extended over a great number of years, and it had been attempted to put an end to that by a deed of compromise between *Bainbridge*, who asserted the sanity and competency, and *Moss*, who asserted the insanity and incompetency of the testator to make the will. That deed was executed. A large sum of money was paid upon the footing of the arrangement which had been entered into. And then *Bainbridge* filed a bill to set it aside, upon the allegation that *Moss*, who insisted upon the testator or alleged testator being *non compos*, knew that he was sane. The Vice Chancellor held that that will not do. What do you mean by "knowing that he was sane?" Whether a man is or is not of sound mind to dispose of his property is a technical question of fact, not of law. But an allegation that a man knows another to be sane, having been all along alleging that he is not sane, is one which a man is really unable to answer. The Defendant may well say, "You must know what you mean. What do you mean? I insist that he was not sane. You insist that he was sane, and you say that I know he was sane. What did I know that you did not know?" I think, therefore, it is quite clear that that was no sufficient allegation; it admitted no traverse of the fact, and therefore it was altogether demurrable. But here it cannot be said that the

(d) 3 Jur. N. S. 58.

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allegation is of a nature not to be capable of being understood. The allegation may be loose, but it is perfectly distinct. It is, that "you led me to believe that when I was doing a particular act I was doing something different from what you knew I was doing"; therefore it does not come at all within that class of cases that was referred to in the argument.

I am strongly of opinion, therefore, upon the authority of *Williams v. Lord Jersey*, or even independently of that authority, that this bill would not have been demurrable upon that ground, even if the question had been attempted to be raised by demurrer; but to attempt to raise such a question, after the answer to the bill had been given in, and the Defendant has shown distinctly that he perfectly understood the nature of the charge, and after elaborate evidence has been gone into upon it, would be trifling with the Court. According to the old practice, if a Defendant had, as in the present case, been called upon to answer to the bill, and evidence had been gone into, and he could have shown at the hearing that he was quite taken by surprise, by the production of certain letters or alleged letters or drafts of letters, and other facts being proved against him, of which he had no notice in the bill, the course would have been, which nobody would have controverted, that the Court would have said, This Defendant must have an opportunity of answering this; he has not had an opportunity hitherto, because you have chosen so to frame your pleadings as not to let him know to what point it was that he was to direct his evidence; therefore, before any decree is made giving relief, an inquiry must be directed by a preliminary decree, giving him an opportunity to clear up all those matters which by your bill, as originally framed, you did not give him an opportunity to clear up. That was the course under the old practice; indeed, I think I

recollect cases in which before the hearing, if it had been shown that any particular thing like a letter or a deed, had been sprung by surprise upon the Defendant, the result has been that, upon application made, the publication was postponed to enable the Defendant to examine a witness to explain the particular fact, or in some way or other justice was done under the circumstances of the case. But now that the course of practice has been altered, that is altogether unnecessary. The allegations of the bill are supported by verbal testimony, testimony, perhaps, not quite so satisfactory as an examination in Court before the judge who has to decide the cause, but still an examination in what I may call open court, before a presiding officer, and which examination enables the Defendant to know exactly in what manner every allegation in the bill is attempted to be proved; and he has advantages in that which he has not in a trial at law, because, after all that has been done, the matter is adjourned for a fortnight to enable him to meet the case; therefore he cannot possibly be misled. The principle of the Court is, that everything that is to be charged against the Defendant must be *allegatum* as well as *probatum*. And the proper mode of alleging is no doubt in the pleading. And when it has been alleged perfectly in the pleadings, it is, for all practical purposes, *allegatum* as well as *probatum*. When the witnesses are examined, the Defendant knows perfectly well what he has to answer; in fact he does answer. And therefore I am of opinion that to listen to that objection now, would be to regard form instead of substance; indeed, it would be proceeding in a mode which the closest analogy to common law would not justify. There are many cases in which, before the law was altered, there might have been a special demurrer, because the allegation was not sufficiently explicit. Special demurrers are now done

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away with. But according to the old practice, you might have specially demurred. Take this very case; you say you led me to believe. I do not know what you mean by that. In such a case I suppose a special demurrer would have been allowed; but if the Defendant chooses to plead over, and go to trial, and there is a verdict, that cures any defect of this sort. And *a multo fortiori* ought it to do so in this proceeding.

I think, therefore, that there is no question at all about the pleadings; they are perfectly accurate and sufficient. I see exactly how it arose that the allegation was not so distinct as, it probably would have been, if all the materials had been before the counsel in the first instance when the bill was framed. But there was naturally a wish to avoid any unnecessary delay; and the matter having been stated in such a way as really enabled the party to answer (I say that for the best of all reasons, because in fact he did answer), it would have been a sort of pedantry to amend the bill by adding farther charges in order to introduce (as it were) evidence which had been already furnished by both sides. Therefore, even supposing that it might have been better to amend the bill, it is utterly immaterial. The matter is now fully before us for decision, as regards the substance and not the form. Those are all the observations which I think it necessary to make upon this point.

[His Lordship here observed on the facts of the case, and declared his entire concurrence with the *Lord Chancellor's* judgment upon them.]

There is distinct and independent evidence that he was a party to leading this young man to believe that the bills for 41,000 £. and 12,000 £., altogether 53,000 £., were bills that had been got in in pursuance of the suggestion of *Johnston*, and that the getting them in by means of *Adams* would be for his benefit.

Then this, a very desperate argument I thought, was urged, that although that may be proved, the allegation is not generally that *Smith* led *Kay* to believe that those were the bills got in by *Adams*, but that the allegation is, that he so led him to believe at the time when he executed the bond at the meeting; whereas in truth, in the evidence, it is shown that nothing of the sort was then referred to. My Lords, in order for that argument to have any weight, it must be tested in this way. Supposing it was distinctly proved, and there was no question at all about it, that the day before they met *Smith* had distinctly in terms said to him, Do not execute any bond except for bills which are proved to have been got in by me or *Adams*. I hold 12,000 £, and the rest are held by *Adams*. Suppose he had distinctly said that, and the allegation was that “at the time *Kay* executed the bond, *Smith* led him to believe,” is it a credible proposition that the evidence would not support that allegation? It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, Before I executed the bond I had been led to believe, and I therefore continued to believe, that it was executed pursuant to the arrangement.

Then, another suggestion made on behalf of the Appellant was, that although this was a fraud at the time of the execution of the bond, it was not a fraud which occasioned the execution of the instrument; not, according to the language of the law, *dans locum contractui*. My Lords, I am not at all clear that it was not *dans locum contractui*. *Johnston* was a man of mature years; he must have been then 32 years of age, and the young man was then 21. *Johnston* had before told him, “These bills are outstanding, they will be presented at your bankers; it will be much to

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your interest to have them all got in." I think it is one proof of the entire ignorance of business of this young man that he did so believe ; that he acted upon that belief. I think it is very doubtful, at least it is not at all clear to me, that he would have given the securities, if this had not been represented to him. But the question is, would he have given the securities if the whole truth had been told to him? I think even this young man, when called upon to execute the bond, would have started if he had known all that had been going on. But at the same time it is quite unimportant. It does not lie in the mouths of these persons to say what he would have done if they had not concocted the fraud, and if there had never been any deception at all practised. That is not the question. The question rather is, what this young man would have done if he had known all that had really taken place. In my opinion it is very doubtful whether he would have given the securities, for the reason I shall presently state ; but I do not think that is the issue here. The issue is, not whether the Plaintiff has shown that he would not have executed the securities but for the representation of *Smith*, but whether *Smith* has satisfied, or can satisfy us, that the Plaintiff would have executed them without. The *onus probandi* is on *Smith* in this case, for the reason which I now proceed to state.

In my opinion, although this bill is framed upon the ground of this supposed fraud, the circumstances of the case as now proved make it abundantly clear that this fraud was totally immaterial in order to entitle the Plaintiff to set aside this bond, upon the ordinary principle of the Court, which protects an infant, or any other person, who is, from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. My Lords, there is, I take it, no branch of the

jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependance, as it were, upon others, from being imposed upon by those upon whom they are so dependant. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances. The principle is not confined to those cases, as was well stated by Lord *Eldon*, in the case of *Gibson v. Jeyes* (*e*), in which he says it is "the great rule applying to trustees, attornies, or any one else." Now, what does "any one else mean? It is contended that it applies only to persons who stand in what is called a fiduciary relation. I believe, if the principle is examined, it will be found most frequently applied in such cases, for this simple reason, that the fiduciary relation gives a power of influence: but I could suggest fifty cases of fiduciary relation where the principle will not apply at all. If a man makes me trustee of an estate, to pay certain securities, and then ultimately to stand possessed of it for him, we deal with one another in purchase, or in any other way, perfectly at arm's length. I have no influence over him because I am his trustee. It is only a particluar sort of trusteeship that gives influence.

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Now, looking at this case upon that general principle, can any influence be more direct, more intelligible, and more to be guarded against than that of a sharper like *Johnston*, who gets hold of a young man of fortune at nineteen years of age, and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall all be

(*e*) 6 Vesey, 266, 278.

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ratified so as to make the securities good? I think there is no case which can be suggested to which the principle of a court of equity more distinctly applies, and in which it will be more readily exercised, than that of a person obtaining and exercising such influence. We do not want the technical description of his making himself guardian in his own wrong, as it were, over this infant, and then misleading him to give securities, which, if he had been of riper years, he would not have given. The principle of the Court, as has been often remarked, is not confined even to the time whilst the relation subsists. During the minority of the child, or of the ward, of course he can give no valid security. But the Court has said, that after that relationship has terminated, no advantage shall be taken of the child, I think, until the child has either had independent advice, and is acting, therefore, quite free from influence, or till so much time has elapsed that it may be fairly supposed that he thought for himself, and has consulted any independent adviser whom it may be reasonable that he should consult. In the Court of Chancery, I think, we are obliged to cut the knot as to the question of time, by naming some time. I believe a security given by a person under age is always liable to be impeached as being given under undue influence, unless it can be shown that the infant had professional advice, or unless due precautions have been taken against his acting under undue influence, and, after coming of age, unless a certain time has elapsed; I believe the rule is, that a year must elapse. It is necessary to draw some line, but, of course, if it could be shown that undue influence was exercised after the year, the same principle would apply; but, generally speaking, it is assumed that, after the expiration of a year, the young man would have been in the world and be able to judge for himself.

Now, the application of that principle would certainly enable *Kay* to set aside anything obtained by *Johnston*. And, in my opinion, *Smith*, as regards these advances, cannot stand in the slightest degree in a different position from *Johnston*; he advanced everything with the knowledge that it was all going to the young man. It did not all go to him; but he says, that he supposed that it was all to go to the young man, and that it was all upon promises from the young man to *Johnston* that the securities should be ratified when he came of age. I think that the principle that would be applicable to *Johnston* is just as applicable to *Smith*; and that upon that ground, if the bill had been framed after all these facts were known, it would have been quite unnecessary to set up the particular fraud, but that everything might have been set aside, even if there had been no suggestion of *Adams*' getting in the bills, or even of those schemes that were concocted just before the young man attained his age of twenty-one.

I have no other observations to make upon this case except one, which I feel bound to make for the protection in future of this young man. It has been often said that courts of justice have nothing to do with what are called principles of honour, and there is a well-known case in the books, with which those who practise in the courts are very familiar, in which, upon a counsel saying to Lord *Thurlow*, "Your Lordship must think in point of honour" so and so, Lord *Thurlow* said, "Upon that ground you must apply to the person himself; I do not give any opinion upon that subject." I should have abstained from saying anything upon that subject, were it not that the duties of this young man in point of morality and honour have been strongly urged by the counsel for Mr. *Smith* at the bar; and that having been done, I think I am not stepping beyond the

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line of my duty when I say that I consider that this young man, upon the strictest principles not only of morality, but of what, if it differs from morality (which perhaps it does not) I shall call the fairest and most honourable dealing and the strictest principles of honour, is not called upon to pay a single farthing, except what, upon an account between himself and *Johnston*, shall appear to be due, as having come into his pocket, either in money or in money's worth. And if any man ever suggests to him that he is bound otherwise to Mr. *Smith*, I think he will be advising him contrary to what are not only his interests, but also to what the interests of the public require to be asserted as the grounds on which he ought to act.

Lord *Wensleydale* :

My Lords, I have very few observations to add after the full and ample discussion which every part of this case has undergone by my noble and learned friend on the woolsack, and my noble and learned friend opposite. I agree in almost every observation which has been made by both of them. There is only one point upon which my mind is not entirely satisfied. I take it to be clear that the statement made by my noble and learned friend opposite as to the power of the Plaintiff to give evidence of all these transactions, under the statement of the case set forth in the bill, is quite satisfactory. The bill ought to have been demurred to if it was not framed in a proper manner, but, that not having been done, it is now too late to raise that objection.

I take it to be unnecessary, also, to discuss the question whether Mr. *Kay* stood in such a situation either towards *Johnston* or towards *Smith* as to require from him a fuller explanation of the case, in order to enable a court of equity

to set aside the deeds which had been given upon the ground of moral fraud. I think it unnecessary to discuss that, because it has been most clearly made out, from the statement of my noble and learned friend on the woolsack, that *Smith* was a party to the fraud. It is a matter which cannot admit of the least doubt, that in a very early part of the transaction between these persons, *Smith* and *Johnston* were in league together to practice a fraud upon *Kay*, so as to induce him to give his ratification after he came of age to an enormous number of bills which had been put in circulation. That is a matter beyond all doubt, and I am sure I should only weaken, if I make any observation upon the subject, the strong and satisfactory observations which have been made by my noble and learned friend on the woolsack. It is a point which does not admit of any doubt.

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Therefore I think the deeds must clearly be set aside upon the ground of fraud, provided only one thing is shown, namely that that fraud was the cause of the contract. Now, I take it to be perfectly clear that, in order to set aside a deed on the ground of fraud, there must be moral fraud, and fraud causing the contract, *dolus dans causam contractui*; not necessarily a fraud which is the sole cause of the contract, but a fraud without which the contract never would have been made. This principle has been often laid down, and is, I apprehend, indisputable; and it is admitted in the great case of *Small v. Attwood* (f), in different forms of expressions, by most of the noble and learned lords who were concerned in giving judgment in that case. Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only where it is the

(f) 6 Clark & Fin. 232.

the securities being given to *Adams* for the benefit of *Johnston*, I doubt myself whether it is satisfactorily made out that that fraud really led to the giving of the securities to *Smith*. My mind is not quite satisfied upon that point.

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Nor do I entirely concur with my noble and learned friend opposite, that there is any difference in the rule upon this subject, according to whether the deed has been obtained by fraud of such a nature as to avoid the instrument at common law, or whether it has been obtained by improper conduct, which would avoid it in a court of equity. I say no more than that I am not quite satisfied upon that point. But upon every other part of the case I entirely concur in the observations which have been made by my two noble and learned friends. Probably I am wrong in my view of the case as to those two points upon which I have expressed doubts, because both my noble and learned friends, and I believe also my other noble and learned friend opposite, think that this fraud or misconduct, whichever it was, on the part of *Smith* and *Johnston*, is sufficiently shown to have led to the giving of these securities, and that therefore the securities are void. All that I say is, that I am not entirely satisfied upon that part of the case.

Lord *Kingsdown* :

My Lords, in this case the facts appear to me so clearly proved, and the rules of the Court of Equity applicable to it are, in my view, so free from all doubt, that I should have thought it was scarcely possible for any counsel, however ingenious, to raise any other question in the cause than whether the pleadings were so framed, and the proceedings in the cause had been such as to enable a Court of Equity to administer to the Plaintiff that relief to which, upon the merits, he was, beyond all controversy, entitled.

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My Lords, with respect to the observations which have just been made by my noble and learned friend opposite, I confess I am unable to discover upon what ground it is possible to separate the bills in the hands of *Smith* from the bills in the hands of other persons. The short case is this: that *Johnston* having acquired unbounded influence over this young man, procures from him acceptances to the amount of 53,000 *l.* in consideration for which he advances to him in money, or in money's worth, something less than 23,000 *l.*, certainly something less than 24,000 *l.* And the acceptances thus given are used by *Johnston* for the purpose of raising money from *Smith* and from *Adams*, both those parties being perfectly cognizant of the position in which *Johnston* stood towards *Kay*; and although they might not be, and probably were not, acquainted with the details of the fraud practised upon him, and with the scandalous devices and gross frauds by which this young man was induced to give acceptances to twice and more than twice the amount of all that was paid to him, yet they knew perfectly well the position in which *Johnston* and *Kay* stood to each other; and they advanced their money to *Johnston* upon the assurance of *Johnston*, that when this boy came of age, by his influence these securities, which were mere waste paper during his minority, should, as soon as he came of age, be confirmed and established by him, in utter ignorance of every circumstance which it was important that he should know, in order to give that confirmation the slightest validity.

I quite agree with my noble and learned friend on my right, that it is not the relation of solicitor and client, or of trustee and *cestui que* trust, which constitutes the sole title to relief in these cases, and which imposes upon those who obtain such securities as these, the duty before they obtain their confirmation, of making a free disclosure of

every circumstance which it is important that the individual who is called upon for the confirmation, should be apprised of. The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals, are those of trustee and *cestui que* trust, and such like. It applies specially to those cases, for this reason and this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a Court of Equity, are just as applicable in the one case as in the other. How then is it possible in such a case as this, that these securities given by *Kay* can stand for one moment, even supposing that this particular representation upon which the bill is mainly founded, had never been given?

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But there is one part of this decree to which my noble and learned friends have not adverted in their observations which has excited some remark during the discussion at the Bar, I mean that part of the decree which directs that an injunction shall issue to restrain *Smith* from suing upon these bills, which it is said is an improper direction, not asked by the prayer of the bill, and not warranted by the facts stated in it. Now, my Lords, I rather think, upon consideration, that the course which has been taken in this respect is one which must be considered to have been acquiesced in on the part of the Appellant, and which is now first objected to by those who, not having been counsel originally in the case, have now appeared on his behalf at your Lordships' Bar.

The situation in which this case stood was very remark-

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able. This young man, having reason to doubt whether he had not been defrauded by misrepresentation and deceit, had filed a bill, I think before the institution of this suit, for the purpose of setting aside these securities on the terms of paying every shilling which had been actually advanced to him, or applied for his benefit, with interest upon the sums so advanced. It is, in my opinion, a great mistake to suppose that the equity of the plaintiffs in that case was founded exclusively or even principally upon the fact that the securities were given during his minority. He would have been equally entitled to relief if the same transactions had taken place within two years after he came of age, instead of two years before, if the same influence had been obtained and abused, and the same confidence reposed and betrayed, as he is under the circumstances which actually occurred. The difference, I apprehend, to be this: that in the former case he would have been entitled to relief only upon the terms of paying what had actually been advanced, whereas no such terms could have been imposed upon him in the case of his infancy, except upon the ground of that assent which he had voluntarily given. It turns out that having made this offer, which I perfectly agree with my noble and learned friend on my right (and I heard with the greatest satisfaction the observations which he made on that subject), was the utmost that could possibly be required from this young man, and having filed this bill, he is told or he believes that, in addition to those monies which *Johnston* has advanced, *Smith* has actually paid, in taking up bills by his desire from the hands of third persons, a farther large amount; and he then makes an offer, which I must say, seems to me to go beyond, or at all events to go to the utmost extent of anything that he could be required to do. He says, Whether I have received this or not, if these monies have been *bonâ fide*

paid to *bonâ fide* holders of these bills, though not a shilling of it has ever been paid to my use, that money I am content to pay; but then, upon my paying what has been actually paid, I desire to have those securities given to me. Well, my Lords, it turns out that that representation, which beyond all doubt had been made by *Smith*, or with *Smith's* sanction, is utterly false. There was no such case made out. It turns out upon investigation, that his bills were a portion of those 53,000 £ bills which *Johnston* had received from *Kay*, and upon which *Johnston* had raised 30,000 £.

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In this situation of things it is clear that the Plaintiff had completely (at least in my opinion) made out the case which he had set up by his bill, and that he was entitled to the relief which he asked; he was entitled to have those securities set aside. He had not asked, and possibly he was not entitled, upon the bill, so standing, to have those bills of exchange or acceptances delivered up. But this suit seems to have come on for hearing at the same time with the suit of *Kay v. Johnston*, and in that suit, on the very day on which the decree in this case was made, a decree was made for the purpose of taking an account of all that had been advanced in the accounts between *Johnston* and *Kay*, and of ascertaining whether, upon the balance of those accounts, anything was due from *Kay* to *Johnston*. Now, although *Smith* had not, in my opinion, the least colour of right to resort to *Kay*, he had a clear right to resort to *Johnston* for anything that *Johnston* was entitled to receive from *Kay*. In this suit, as it was constituted, there was no power of giving any such relief. *Johnston* was not a party to this bill, but the cause of *Kay v. Johnston* was in hearing at the same time, and it was suggested, by the *Master of the Rolls* apparently, that *Smith* should be per-

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mitted to go in in that suit and establish any claim for the balance which might be found due in that suit between *Kay* and *Johnston*. Now, that was obviously for *Smith's* advantage, but if he availed himself of that advantage, he could not at the same time sue *Kay* upon those bills. And, therefore, it seems to me that these two directions, that he should be at liberty to go in in that suit of *Kay v. Johnston*, and, that he should be restrained from suing upon the bills, are correlative parts of the same decree, and that, if the one stands the other is a necessary consequence of it.

From what passed at the hearing, I rather collect, that the counsel in that suit, on behalf of the Defendant, acquiesced, and desired not only to have that liberty to go in, but to be permitted to attend at the taking of the accounts in that suit, for the purpose of having that balance ascertained. I see that when Mr. *Roundell Palmer* says, "I think your Honor said that *Smith* should be at liberty to go in and establish any claim he may be able to make out against *Johnston* in the suit of *Kay v. Johnston*," upon that Mr. *Speed*, counsel, I believe, for the Appellant, says, "and to attend the taking of the accounts."

This appears to me to have been the only difficulty in the case. No doubt, if the facts had been known at the time when the original bill was filed against *Johnston*, *Smith* would have been made a party to that suit. *Smith* and *Adams* stood in the position in which they were entitled to stand; that is to say, accounts had been taken against *Johnston*, and anything which was due from *Kay* to *Johnston* would have been assets for the purpose of satisfying what was due from *Johnston* to *Smith* and *Adams*, in respect to this transaction; *Smith* not being a party to that suit, such an order could not be made in his case. The two causes

were for hearing together. *Smith*, by going in in that suit, had a full opportunity of attending the examination of all these accounts, and of investigating all these transactions, and of ascertaining what was the real state of the accounts between *Johnston* and *Kay*.

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That was by no means, as it would appear at the time, a concession without value. For, observe what had been done. There had been actually raised out of this young man's estate, and paid into the hands of *Johnston*, more than the whole amount of all that had been advanced by him to *Kay* during his minority with interest. The way in which I put it is this: *Johnston* had advanced 23,000 *l.*; that sum was constituted partly of *Adams'* advances and partly of *Smith's* advances. Now, what was the sum which was raised out of this young man's estate, and paid by *Smith* himself into the hands of *Johnston*? Why, 30,000 *l.* More than the whole amount of *Adams'* and *Smith's* advances together, and more than the whole amount which *Johnston* had advanced for him. *Johnston* represented that the full amount which he had charged upon these acceptances had been applied for this young man's benefit. Instead of suing upon his bills, therefore, which in truth were good for nothing, the Defendant takes advantage of the offer which is made to him, and he goes in and avails himself of the liberty to attend at the taking of the accounts to have that balance actually ascertained, with liberty to him to be paid out of anything that was due from *Kay* to *Johnston*, the amount of what is due from *Johnston* to him. It seems to me, therefore, that the decree is in substance perfectly right. No objection, in respect of form, appears to have been taken at the hearing of the cause, and, therefore, the decree must be affirmed, and, of course, with costs.

Sir J. L. GOLDSMID and W. KING - *Appellants.*
 JAMES CAZENOVE and others - - *Respondents.*

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Bankruptcy.
Double Proof.
Concordata.
Foreign Court.

The rule which prohibits double proof is not confined to the case where one of two firms consists of only one person, who is also a member of the other firm, but applies likewise to a case where the two firms consist of several persons, some of whom are members of both firms.

Ex parte Moulton (1 Dea. & Ch. 44 ; Mont. 321), and *ex parte Hinton* (De Gex, 550) confirmed.

A. and *B.* were partners in *Liverpool*; *A. B.* and *C.* were partners in *Pernambuco*. The two firms had dealings with each other. *A. B.* and *C.* drew a bill on *A.* and *B.*, and sold it to persons at *Pernambuco*, who believed that the partnerships were distinct, but that *A.* and *B.* were partners in both. On arrival in *Liverpool* the bill was accepted by *A.* and *B.*, but before the time for payment both firms became bankrupt. Under the law of *Brazil*, the holders of the bill proved against the estate of *A. B.* and *C.* at *Pernambuco* and received a dividend, and then claimed to prove under the *English* commission :

Held, that they were not entitled to this double proof.

THIS was an appeal against an order of the Lords Justices, sitting in Bankruptcy, confirming an order of Mr. Commissioner *Perry*. The case agreed on between the parties set forth the following facts.

Two persons named *George Deane* and *Frederick Youle* carried on business at *Liverpool* under the name of *Deane, Youle, and Co.* They carried on a separate business at *Pernambuco* in the *Brazils*, in connexion with *Alfred Phillips Youle*; the firm there being also called *Deane, Youle, and Co.* They had transactions with each other, but the consignments made by the *Pernambuco* firm to the *Liverpool* firm exceeded those received from it in value and

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The other bill was exactly in the same form, the only difference being in the date, 19th *June* 1854, and the amount, 5,000 *l.* The purchase money for the bills was duly paid by the *Brazilian* Government, and the appellants were the agents of that Government. The Government and its agents believed, as the facts were, that the *Liverpool* and *Pernambuco* partnerships were separate and distinct partnerships, and that *G. Deane* and *F. Youle* were partners in both firms, and that the Government would be entitled to have recourse for payment of the bills to each of the firms. The bills were duly accepted and then presented for payment, and there was due in respect of them, at the date of the petition for adjudication, for principal and interest, the sum of 15,115 *l.* 1 *s.* 5 *d.*

On 13th *November* 1854, a petition for adjudication in bankruptcy was filed against *George Deane* and *Frederick Youle*, under which they were duly found bankrupts, and the present Respondents were appointed the official and the creditors' assignees.

On 25th *June* 1855 the *Pernambuco* firm entered into a *Concordata* or agreement with its creditors, which was ratified according to the laws in force in *Brazil*.

According to the said laws, any matriculated merchant in the *Brazils* who shall fail to meet a pecuniary engagement punctually, is denominated "*fallido*." There are three classes of *fallidos*, viz., accidental, blameable, and fraudulent. The members of the *Pernambuco* firm were matriculated merchants, and belonged to the class of accidental *fallidos*, with respect to whom the following is the course of proceeding according to the aforesaid laws. A *fallido* must, within three days of suspending his payments, give to the tribunal a balance sheet showing the state of his affairs. If from the balance sheet the *fallido* appears to be insolvent, the first duty of the tribunal is to appoint a mem-

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ber of the tribunal, who acts as judge commissary, and presides at all proceedings in bankruptcy, as well as an assignee who is chosen from the creditors, whose duty is at once, in conjunction with the district judge, to secure the papers and effects of the fallido, placing the same under seal. The judge commissary, within three days of his appointment, summons a meeting of creditors to take place within six days, whence from amongst the creditors a trustee or trustees is or are chosen by them to take charge of the property of the bankrupts, in whose presence the seals are to be broken and an inventory made. The property and effects of a firm, and the property and effects of each individual member of the firm, form one common fund for payment of creditors. At a meeting of creditors appointed by the judge commissary (who is one of the commercial members of the tribunal appointed for superintending the several forms to be gone through in the particular insolvency) the amounts due to the creditors are entered upon. No distinction is made between creditors of the firm and the private creditors of the individual partners. At this, or at a subsequent meeting, if adjourned in order that a committee of creditors may examine the several balances, one of two courses for the administration of the estate is determined on by the creditors. The court gives power to the fallido to propose to his creditors at this meeting a "*concordata*." It does not prescribe what the terms of this *concordata* shall be. It contemplates, however, that it will be an arrangement by which the winding up of the affairs of the fallido will be entrusted to himself, and his property restored to him for that purpose. At this meeting the *concordata*, if any be proposed, is accordingly taken into consideration. To be valid it must receive the assent of such a proportion of creditors as shall represent more than half the whole number, and two-thirds in value of all claims

which are liable to be ruled by the *concordata*. The *concordata* is to be refused, or granted and signed, at this meeting. If there be no objection, the judge commissary ratifies it at once. If there be opposition, eight days are allowed for lodging embargoes or grounds of opposition, which, when reported, are sent to the tribunal for sentence. The *concordata*, when ratified, is binding on all creditors, not only those present at the meeting but those absent. The *concordata* being notified to the assignee and trustee, they deliver back to the *fallido* all the property which they have in charge. This is one of the two courses of proceeding for the administration of the *fallido's* estate. The other course is this:—If no *concordata* is proposed by the *fallido*, or if it be refused, the creditors enter into a “contract of union,” whereby they name one or more persons to be trustees to administer the estate. These trustees liquidate, receive, pay, go to law, sell all the property and goods, and do all other acts for the benefit of the estate; after paying all in full any balance which may remain is handed to the *fallido*, and if the property should not pay all in full, the judge commissary is (at a meeting convened for passing the accounts of the trustees), to propose to the creditors whether or not the *fallido* should receive a quittance. If two-thirds in number, who shall also represent two-thirds of amount of claims, agree to give a quittance, this is binding on all, and the *fallido* is free from all future claims. His future property is liable in case he does not get a quittance.

These proceedings were first introduced into the *Brazilian* law in 1850.

There was an absolute majority of votes of creditors in favour of the *concordata* so proposed and entered into by the *Pernambuco* firm, and the effect of the *concordata* was to give to them the same power as if there had been a contract of union.

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elected, and were not entitled to prove upon the estate of the *English* bankrupts.

On the 23d *May* 1856, the Appellants appealed to the Lords Justices of Appeal in Chancery, praying that the order of Mr. Commissioner *Perry* might be reversed or varied, and that it might be declared that the said petitioners were entitled to prove under the adjudication for so much of the bills as had not been paid in manner aforesaid, notwithstanding the receipt by the petitioners of a dividend under the *concordata*, and that the petitioners' proof might be ordered to be admitted accordingly, &c.

The petition came on to be heard on the 1st *August* 1856, when their Lordships differed in opinion; but Lord Justice *Turner* agreeing with the learned Commissioner, his order was affirmed (a). The present appeal was then brought.

Sir *H. Cairns* and Mr. *De Gex*, for the Appellants:

The reasoning of the Judges in the Court below, shows them to be in favour of the Appellant, but they considered themselves fettered by the previous authority of *ex parte Hinton* (b), which, it is submitted, cannot be supported on principle.

The *concordata* in *Brazil* has been considered as having the effect of an *English* bankruptcy, and the matter has therefore been treated as if the two partnerships and their estates were in this country. In such a case, the law of course does not allow a double proof against a joint estate, and against the separate estate of any member of the same firm, for both estates are for the purposes of this rule to be taken as one, the reason being that the surplus of the separate estate of each member of the firm, after paying

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(a) 1 De G. & Jo. 557.

(b) De Gex, 550.

distinction in principle between that case and the case of two firms with two or more of the persons comprising them being partners in both. If there were two firms of *A. B.* and *C.*, and *A. B.* and *D.*, there might, in like manner, be proof against both. These instances show that, in order to prevent the double proof, the benefit from the surplus of the first to be received by the second firm, must be immediate, and not remote. There is very little principle to be discovered in the cases, which are not uniform nor consistent with each other. In *Ex parte Rowlandson* (c), two traders were in partnership; there was a joint commission against both; there was also a separate commission against each. The petitioner proved his debt under all three commissions, and received a dividend under the joint one; he applied for a dividend under each of the others, but was refused, Lord Chancellor *Talbot* assimilating the case to an action on a joint and several bond, where, if the obligee sues the obligors jointly, he cannot sue them separately, but the pendency of one action may be pleaded in abatement of the other. That reasoning is not satisfactory; the real ground to justify the decision is, that the surplus of one estate would fall directly into the other. In *Ex parte Bond* (d), Lord *Hardwicke* had, in like manner, held, that in such circumstances the creditor must make his election between the two estates, but gave him time to look into the accounts before doing so. But these cases have not been uniformly acted on. In *La Forest's* case (e), in which there were separate partnerships composed of the same four individuals differently arranged, the petitioner was the holder of a bill drawn by the partnership of the four on and accepted by the partnership of two of their number, and he applied to prove against the joint estates of the two and of the four.

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(c) 3 P. Wms. 405.

(d) 1 Atk. 98.

(e) 1 Cooke, Bkpt. Laws (Ed. by Roots), 276.

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The *Lord Chancellor* first directed an inquiry whether the petitioner at the time of taking the bill knew of the actual state of the partnerships, and if he did not know he was to be declared entitled to prove against the joint estates of both. If he did know, then application was to be made for farther directions. The claim, therefore, was not distinctly rejected. In *Ex parte Benson* (*f*) *Marsh* and *W.* and *J. Houghton* were in partnership as cotton manufacturers; *W.* and *J. Houghton* were in partnership as grocers. There were commissions against all. A bill had been drawn by *Marsh* on all three, and accepted as drawn, but not paid. The holder claimed to prove against all; the assignees insisted that he must elect, but he was allowed to prove against the joint estate of *J.* and *W. Houghton*, and also against the separate estate of *Marsh*.

In *Ex parte Bonbonus* (*g*), Lord *Eldon* expressly said, that where the paper of one firm was given to the creditors of another, dividends would be allowed to the holder out of both estates. In *Ex parte Adam* (*h*), it was held, that the rule in bankruptcy that a joint and several creditor must elect, does not apply to a contract for a double security against distinct firms, namely, a bill drawn by all the partners against a distinct firm constituted of some of them, and in that case proof was allowed against both estates. In the report in *Rose*, which was not published till two years after that in *Vesey* and *Beames*, it is said that "the petitioner, as ignorant of the connexion of the parties, was entitled to prove against both estates." In the other report, which is fuller in every respect, his right is not put on that restricted ground. In *Wickham v. Wickham* (*i*), there was a creditors' deed, in which it was agreed that the estates

(*f*) 1 Co. B. L. 278.
 (*g*) 8 Ves. 540.

(*h*) 1 Ves. & B. 493; 2 Rose, 36.
 (*i*) 2 Kay & Johnst. 478.

were to be administered according to the rules in bankruptcy. Vice Chancellor *Wood* confined the doctrine in *Moult's* case to cases in which "a party is engaged in two trades,—engaged alone in one trade, but with a co-partner in another—you cannot in respect of his dealings as such sole trader, have any right of proof against the estate of his co-partner," and he referred to *Hinton's* case, but distinguished the case then before him from the others, on the ground that a stranger was introduced into one of the firms, who had no concern whatever with the other, and so made the security which would otherwise have been common to both a collateral security as to the firm of which the stranger was a member. He referred to, and adopted, *Ex parte Adam*, and said, "There a stranger was introduced into one of the two firms, and that circumstance was held to bring the case within the rule to which *Ex parte Moult* was an exception, namely, that where there are two firms, and one of them contains one partner, who is a stranger to, as well as one partner who is a member of, the other, there you may prove the paper of both firms against the estates of both."

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In *Ex parte Wenslay (j)*, *A.* was a sole trader, *B.* and *C.* were partners, and *D.* was a sole trader; all of them engaged in a joint adventure, a joint purchase of goods. The vendor, with a knowledge of their joint interest, received in payment a bill drawn by *A.* and accepted by *B.* and *C.*; and it was held, that on the bankruptcy of *A.* and of *B.* and *C.*, the vendor was entitled to prove for its amount against both their estates on the ground that it was a double security. In *Ex parte Bigg (k)*, double proof was rejected, but that was on the ground that the holder of the bill was aware, from the first, of the identity of the

(j) 1 Rose, 441; 2 Ves. & B. 254.

(k) 2 Rose, 37.

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drawers and acceptors. So, in *Ex parte The Bank of England* (l), it was held, that a creditor who, knowing the partnership of the parties, takes a bill drawn by all, and indorsed by one, is not entitled to double proof, on the ground that, previously to taking the bill, he required and had the indorsement of the one, and thereby raised a contract of double security. The *Lord Chancellor* said, that substantially it was a joint and several security, which, in bankruptcy, was confined in its proof to a right of election against the joint or the separate estate. In *Ex parte Husbands* (m) there were two persons of the names of *J. B.* and *P. B.*, who traded as *J. B.* *P. B.* was, in fact, his sleeping partner. *J. B.* drew a bill upon *P. B.*; the holder was ignorant of the sleeping partnership, but it was proved that the bill was drawn for the partnership purposes, and it was held, that he was not entitled to prove against the joint estate of the two, but might prove against the separate estates of each. In *Ex parte Moulton* (n), upon which *Ex parte Hinton* was founded, the circumstances were these. There were four houses of business. *Geddes* carried on one under the name of *Geddes and Co.*; he was a partner in the three other houses, known as *Barrow and Co.*, *Johnson and Co.*, and *Radcliff and Co.* *Barrow and Co.* drew bills on *Johnson and Co.*, which were indorsed by *Geddes and Co.*, and discounted by *Williams*. *Barrow and Co.* became bankrupts, and so did *Geddes and Co.*; *Williams* proved under both bankruptcies, and then application was made that he might be compelled to elect. The Judges of the Court of Bankruptcy were equally divided in opinion; it was heard on appeal, and finally it was decided that the holder of the bill was not entitled to double proof. *Geddes*,

(l) 2 Rose, 82.

(n) 1 Deac. & Ch. 44; Mont.

(m) 2 Glyn & J. 4; 5 Madd.

321; Mont. & Bli. 28.

though trading under the form of a partnership name, was a sole trader, and that was, in substance, the reason why double proof was excluded. That point was thus put in argument by Sir *E. Sugden*: "There is no case where one individual constitutes a nominal firm, being at the same time a partner in another firm, in which double proof has been allowed;" and that argument was adopted by the Court. So that *Moult*'s case may be taken to be decided on the ground that one of the firms consisted of a single person, who was himself a partner in the other firms. *In re Vanzeller* (o) certainly went on that ground. Then came *Ex parte Hinton* (p), where the circumstances were these: there were two firms, one called *Acramans, Morgan and Co.*, consisting of three *Acramans, Holroyd, Morgan*, and *Franklyn*, the other called *D., E., and A. Acraman*, consisting of the three *Acramans*. A note was drawn in favour of "*W. E. Acraman, Esq.*" (q), by *Acramans, Morgan and Co.*, and was indorsed by *D., E., and A. Acraman*. This note was discounted by *Hinton*, who, at the time of the discount, knew that the three *Acramans* were partners in the other house. Both houses having become bankrupt, he proved under the fiat against *Acramans, Morgan and Co.*, and received a dividend of 2s. 6d. in the pound; his proof against the house of *D. E. and A. Acraman* was refused by the Commissioner. On appeal, Vice-Chancellor *Knight Bruce*, then the Chief Judge in Bankruptcy, declined to give any opinion whether knowledge on the part of the petitioner was material, but held that there was no distinction between the case of *Moult* and the one which was then before him, and so he must be governed by that case, of which, however, he suggested his

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(o) 1 Mont. & Ayr. 345.

(p) De Gex, 550.

(q) He was, in truth, the "*E. Acraman*" of the firm.

clear distinction between a case like this and a case in which one man carries on one business and is himself a partner in another firm. In that case, double proof could not be insisted on. The rule, however arbitrary, is established; but it ought not to be extended to a case like this, where there are various partners in both firms, and each firm undertakes a distinct liability.

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Mr. *Bacon* and Mr. *Griffiths* for the Respondents, the assignees under the *English* bankruptcy :

Here are two bankruptcies. One takes place on 1 *November* 1854; the effect of that is, to assign to the creditors of *Dean* and *Youle* all the joint and separate estates of those persons all over the world. But at *Pernambuco* the assignees had not the power to make their rights available. The authorities of that place possessed themselves of the whole of the joint and several assets there of the two houses, and of all the three partners, and have declared a dividend, which has been paid to the Appellants. The creditors under that *Brazilian Cessio* have, by the effect of their proceedings, acquitted their claims against the *fallidos*, yet here they seek to avail themselves of the administration of the *English* funds to the injury of the *English* creditors, who have received no advantage, but have actually suffered loss from the *Brazilian* proceedings. That is contrary to the whole spirit of the Bankrupt Laws, from the 34 & 35 *H.* 8 to the present time. These laws have given to the creditors equal rights against the estate of the debtor, but that has been in favour of all, not of some, of the creditors.

No doubt there are some cases in which double proof has been allowed, but they will all be found to be cases where the parties allowed that advantage have first shown that they were ignorant of the state of the two firms. *La*

arising from the mere fact that in the case of one of the firms consisting of one person only, the surplus of the separate estate falls directly into the joint estate of the other firm, while, where each of the two firms consists of more than one person, there is a double filtration of the assets before either of the firms receives the benefit of a surplus from the other. Nor can it make any difference that the debt here was upon a bill of exchange, instead of a mere sale of goods, for if that was so, then in every case the holder of such an instrument would have a double proof, and would in that way defeat the essential principle of the bankrupt law, by getting twice the amount of any other creditor. Besides, if the nature of the instrument is to be relied on, then it may be observed that the *concordata* operates as an absolute discharge of the liability of the *Brazilian* house, and such a discharge of any one party to a bill is a discharge of all, *Ex parte Smith* (y). The judgment now appealed against cannot be reversed without overruling not merely *Hinton's* case, but also that on which it proceeded, *Moult's* case, which has been considered settled law for thirty years, and on the authority of which enormous amounts of property must have been distributed. The law of the place where the contract is to be performed is that which governs its enforcement. *Don v. Lippmann* (z), and that is, in this case, the law of *England*. The *English* law of bankruptcy is that which is applicable here, and that law requires an equal distribution of assets among the creditors, and prohibits any one creditor from receiving, by double proof, double of what is received by the rest. That is not an arbitrary rule, but is the result of the statutory application of equitable principles, and the cases where it has not been applied are all

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(y) 3 Bro. C. C. 1.

(z) 5 Clark & F. 1.

the excess in both these cases should now be laid down. Suppose the case of two partnerships, *A.* and *B.* and *A.* and *C.*; one partnership draws, the other accepts a bill; both become bankrupt; you may prove against both. If *A.*'s separate estate is solvent, the surplus of that estate will go to the joint estate of *A.* and *C.*, and, therefore, if proof was not allowed against both partnerships, *C.*'s estate would escape altogether. The only difference between the case supposed and the present is, that here the second partnership consists of *A.* *B.* and *C.* instead of *A.* and *C.* alone; and, in truth, the case is a repetition of that of *Wickham v. Wickham* (*b*), whence Vice-Chancellor *Wood* treated the claim as one upon collateral security. Then as to the question of notice of the composition of the two firms, that cannot affect the rights of the parties, unless it is used for a collusive purpose. The supposition that it does so rests entirely on the report of the case of *Adam* (*c*) in *Rose's Bankruptcy Cases*. In the report by *Vesey* and *Beames*, which is fuller, nothing is said of notice, and the whole of the doctrine, therefore, as to notice comes to depend on eight words in *Rose's* report, which is neither full nor carefully arranged.

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The Lord Chancellor (Lord *Campbell*):

My Lords, this case has been most fully and ably argued on both sides, and I think that we are in full possession of the facts and authorities. I may say for myself that not only have I heard the very able arguments on both sides, but I have read the judgment of Mr. Commissioner *Perry*, and I have read attentively more than once the judgments of the learned Judges in the Court of Chancery, and it seems to me that farther consideration would not assist me in coming to a conclusion. I own that, at first, I was very

(*b*) 2 Kay & J. 478.

(*c*) 2 Rose, 36; 1 Ves. & B. 493.

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much perplexed, but upon the whole I have come to this conclusion, that *Ex parte Moulton* ought not to be overturned, and that really is the question which the House has now to decide.

That case was very fully considered by the learned Judge who determined it, and there it was held that the double proof ought not to be allowed. I called upon Mr. *De Ger* to distinguish upon principle *Ex parte Moulton* from *Ex parte Hinton*, and with all his learning and ability I think that he has failed in doing so. He only says that *Ex parte Moulton* rests upon an arbitrary rule which ought not to be extended. I however must suppose that it rests upon some principle, and whatever that principle is, it must apply as well to *Ex parte Hinton* as to *Ex parte Moulton*. I cannot distinguish between the case of one member of a firm who is a sole trader in a separate business, and that of two members of a firm carrying on a separate business, all the members of the separate firm being members of the joint firm. It is impossible to draw a distinction between the two cases.

That being so, I think that Lord Justice *Knight Bruce*, when Vice-Chancellor, properly decided *Ex parte Hinton*, and although he has changed his opinion, and has been disposed since to express an opinion dissenting from it, I should say that, in this instance, first thoughts were best; and that he did well in considering *Ex parte Moulton* as a sound authority, and in deciding *Ex parte Hinton* upon it. That case of *Ex parte Moulton* was decided a good many years ago; it has been considered and acted upon as law ever since, and I think that we should not be justified in overturning it.

Therefore, in my opinion, the judgment of the Lords Justices ought to be affirmed. But, my Lords, under all the circumstances of the case, as it was at the request of

the parties on both sides that this appeal to your Lordships' House was brought, and as it was thought to be for the benefit of all concerned, I am of opinion that the costs of the appeal should be paid out of the estate.

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Lord *Cramworth* :

My Lords, I entirely concur with my noble and learned friend. If I had had any anticipation that farther consideration of the case would have enabled me to find out some better principle than that on which all these cases have proceeded, I should have desired time to consider the subject, but I am satisfied that that could not have been the result. The truth is, as was urged, or I should rather say admitted, by the learned counsel on both sides in argument, that there is very little of principle in it. It must be taken to be a rule for the purposes of convenience laid down somewhat empirically—an arbitrary rule, if you please so to call it. But that arbitrary rule having been once established in the case where the minor trader, the minor firm, so to say, consisted of a single person, it appears to me that it would be a still more arbitrary distinction to attempt to say that the same doctrine should not apply where the minor trader or firm was a firm consisting of two or more persons. The only principle that we can elicit is the principle enunciated in the early case before Lord *Hardwicke*, in which he says, that to admit a second proof would be an injury to the joint creditors, that is to say, you would be diminishing the fund which would possibly, in case of a surplus, come to assist the joint estate. Now, as was properly pointed out by Mr. *Bacon*, that argument applies exactly as much where the minor firm is a firm of two or more as where it is a firm of only one person. I say exactly as much, that is to say, exactly as much in principle, though there is one more filtration (as it were) for the dis-

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tribution of the assets to go through. Upon the whole, I entirely concur with my noble and learned friend. I think that the judgment below ought to be affirmed.

Lord *Kingsdown* concurred.

Mr. *Bacon* applied for a direction that if there should not be enough to pay all the costs of the appeal, the assignees, the Respondents, were entitled to be first paid.

Their Lordships assented.

It was afterwards Ordered that the appeal be dismissed, and the order of the Lords Justices sitting in bankruptcy, so far as complained of, affirmed, and that the costs of the Appellants and the Respondents be paid out of the estate of the bankrupts by the Respondents, who as such official and creditors' assignees are authorised first to retain their own costs.

Lords' Journals, 9th *August* 1859.

1860.
 March 2.
 Advowson.
 Rectory.
 Mortgage.
 Purchase.
 Compensation.

WILLIAM EDWARDS-WOOD - - *Appellant.*
 EDWARD MAJORIBANKS and Others - *Respondents.*

A. purchased an advowson. The living itself was subject to a mortgage to the governors of Queen *Anne's* hounty for money advanced to repair the parsonage house. The existence of this mortgage on the living was not communicated to the purchaser of the advowson, who discovered it after the arrangements for the purchase had been made; no fraud, or wilful concealment or misrepresentation was charged:

Held, that the purchaser was not entitled to compensation in respect of this mortgage, which was a charge upon the living, but not upon the advowson, and that he was bound specifically to perform his contract.

THE Respondents were the trustees for the present Sir *Edmund Antrobus*, under the will of the late baronet, and

in virtue of powers conferred by that will, sold to the Appellant the advowson of *Haseley*, in the county of *Warwick*. The Appellant proposed for the purchase in *March* 1857. In *May* 1857 the agreement for the sale was executed. The purchase money agreed on was to be 2,800 *l.* The sale, which was by private contract, was effected under certain stipulations. The first provided for the payment of money or interest thereon until the day of completion of the sale; the second that the vendors would, within fourteen days, deliver an abstract of title, and within twenty-one days after actual delivery of the abstract, all objections were to be made, or the title should be considered as accepted, except as to objections made within that time, and if the objections or requisitions were such that the vendors should be unable or unwilling to comply with them, the vendors might annul the sale without payment of costs; and the last was, that if the purchaser did not comply with these stipulations the vendors should be at liberty to resell at the cost of the purchaser. In *December* 1857 the conveyance was forwarded to the Appellant. In that month he made a search at the offices of Queen *Anne's* bounty, when he discovered that there was a mortgage on the rectory. In the year 1852, the Rev. *W. T. Hadow*, the incumbent, had applied to the patron for his consent to raise a sum of money for the purpose of repairing or rebuilding the parsonage house, and consent being given, a mortgage was effected upon the living for the sum of 696 *l.* and interest. The governors of Queen *Anne's* bounty were the mortgagees, and the property mortgaged consisted of the "glebe lands, tithes, rent charges, moduses, composition for tithes, salaries, stipends, fees, gratuities, and other emoluments and profits whatsoever arising, coming, growing, renewing, or payable to the rector of the said living in respect thereof, with all and every the rights, privileges, and appurtenances

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thereunto belonging.” Provision was made for repayment by instalments. To the mortgage deed were appended a form of consent to the transaction by the ordinary and patron of the living, a form of declaration of title by the patron, and a form of appointment by the ordinary, patron, and incumbent, of a proper person to receive and apply the money. These three forms were signed by the patron, who, however, did not interfere in any other way in the matter. The trustees knew nothing whatever of the mortgage until after the purchase had been effected, when the Appellant discovered it, and 600 *l.* being then due on it, he made a claim for a deduction from the purchase money. The solicitors for the trustees refused to make any deduction, but offered to cancel the contract. This the Appellant refused, but they insisted on doing so under the second stipulation in the contract.

On the 12th *February* 1858 the Appellant filed his bill against the trustees and the patron, praying that they might be compelled to perform the contract and to pay off the mortgage on the said advowson or rectory, or to make him a pecuniary compensation in respect of the mortgage or charge. Evidence was given on both sides, and on the 15th *July* 1858 the cause was heard before Vice-Chancellor *Stuart*, who made an order that the contract should be specifically performed, and that the Appellant should pay the 2,800 *l.* with interest and with costs. On appeal to the Lords Justices they confirmed this order. The case was then brought by appeal to this House.

Mr. *Malins* and Mr. *Schomberg*, for the Appellant, contended that this incumbrance on the advowson not having been communicated to the Appellant, he was entitled to compensation in respect of it, for it would affect the income of the living, the advowson of which he had purchased,

and would therefore affect the value of the advowson. If a man bought an estate with a house on it, he was entitled, in the absence of information to the contrary, to consider that the house had been paid for. In buying this advowson the Appellant had a right to believe that he was buying the title to present to this living, with all the advantages it appeared to possess. Though no imputation was intended to be cast on the other side, for in fact it appeared that Sir *Edmund Antrobus* was not aware of this incumbrance on the living, still this case was in law a case of misrepresentation by non-communication; the next presentation would be less valuable, and the Appellant was consequently entitled to compensation, but he was not bound to give up the purchase. That was the principle acted on in *Burnell v. Brown* (a), where compensation was allowed to a purchaser of land over which, after the purchase, it was discovered that some third person had a right of sporting.

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Mr. *Bacon* and Mr. *Arthur Hobhouse*, for the Respondents, were not called on.

The Lord Chancellor (Lord *Campbell*):

My Lords, this case has been very ably argued by both the learned counsel who have addressed us on behalf of the Appellant, but they have not succeeded in showing that the judgment of the two Courts below is erroneous.

The advowson here was first put up to public sale, but it was afterwards sold by private contract. It is not alleged that there was any misrepresentation or concealment on the part of the vendor. Silence alone is relied on. Now, I apprehend, that in this case the maxim, *Caveat emptor*, applies. This was the sale of an advowson.

(a) 1 Jac. & Wal. 168.

with every circumstance that might add to the value or detract from the value of the advowson, and it is not open to him afterwards to come and say that he has discovered something which makes the advowson of less value, and claim compensation on that account.

It seems to me, that the reasons given by Lord Justice *Knight Bruce*, in which Lord Justice *Turner* says he entirely concurs, are quite conclusive in this case. And I abstain, therefore, from saying anything more, than that I advise your Lordships that this appeal be dismissed with costs.

Lord Cranworth:

My Lords, I concur with my noble and learned friend in thinking that this is an appeal totally unwarranted. It is founded upon an agreement whereby the trustees, at his request, agreed to sell, and the Appellant agreed to purchase, the advowson to the rectory and parish church of *Haseley*, for the sum of 2,800/. They can make a perfect title to that which they agreed to sell; and the ground of complaint on the part of the purchaser is, that the next presentation to the living is less valuable than the Appellant had a right to suppose it would be, by reason of there having been a charge created under the statute for building or materially repairing parsonage houses. That is a matter upon which no representation one way or the other, is made by a vendor when he is selling an advowson. Before the law was altered as to tithes, if the vendor of an advowson knew that there was a modus affecting a particular farm, I very much question whether he was bound to say anything about it. Undoubtedly the purchaser of the advowson gets the right, be it more or less valuable, of presenting to the living in all time to come. If there was any mistake upon the subject of the purchase,

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anybody in the position of Sir *Edmund Antrobus* would naturally do that which he did. He said, If there has been any mistake about it, do not consider yourself bound by what has passed, let the contract be cancelled. The purchaser, however, does not choose to do that. And it appears to me that the proposition for which he now contends is perfectly monstrous; because he says, not that the advowson is of less value, for he cannot pretend that that is the case, but he wants to parcel out the advowson into different portions, and to sell the next presentation, and that he says will be less valuable by reason of this charge to which the living will be subject; and therefore he ought to have compensation. But if he is right in saying that the next presentation will be less valuable, the whole advowson is not less valuable, and the subsequent presentations, therefore, will be more valuable. It appears to me that this complaint is utterly without foundation. The appeal must be dismissed with costs.

Lord *Wensleydale* and Lord *Kingsdown* concurred.

Decretal order and order affirmed, and appeal dismissed with costs.

Lords' Journals, 2 March 1860.

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“ABROAD.” *See* WILL.

ACCEPTANCE. *See* BILLS.

ACCOUNT. *See* PRACTICE.

ACTS OF PARLIAMENT (PRIVATE). *See* EVIDENCE, 3.

ADEMPTION. *See* WILL.

The presumption of law is against double portions ; where a sum of money is given by the will of a parent to a particular child, and the like sum is afterwards secured by a settlement on the marriage of that child, there is a presumption in favour of the ademption of the legacy, but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is not necessary that the legacy should be paid in order that it may be adeemed.—*Hopwood v. Hopwood*, 723.

A father made his will, giving to each of his three younger children 5,000 *l.* On the marriage of one of them, a daughter, he paid to the husband 2,000 *l.* By a codicil he declared that sum to be in part satisfaction of the 5,000 *l.* One of his younger sons, *F.*, married. On that marriage, the father entered into a covenant that he would cause to be paid to the trustees of the marriage, within twelve months after his death, the sum of 5,000 *l.*, with interest in the meantime, at the rate of five per cent., such interest to be employed in the payment of premiums on life policies. By a codicil made after the date of this settlement, the testator recited what he had given by his will to each of his two younger sons, and directed his trustees to raise “a farther sum of 7,000 *l.*” for each of them, and to hold such farther sum on the same trusts as those of the 5,000 *l.* The testator afterwards raised a sum of 5,000 *l.*, with which he purchased a Lieutenant-colonelcy in the Guards for his other younger son, *H.*, and he then made a codicil, declaring that this sum, so laid out, was to be taken by *H.* in satisfaction of the legacy given him by the will :

Held, that these circumstances did not show an intention on the part of the testator rebutting the presumption that the 5,000 *l.* given by the will to *F.* were adeemed by the settlement.—*Id.*

Meaning of the word “farther.”—*Id.*

ADULTERY. *See* DIVORCE.

ADVOWSON.

A. purchased an advowson. The living itself was subject to a mortgage to the governors of Queen *Anne's* bounty for money advanced to repair the parsonage house. The existence of this mortgage on the living was not communicated to the purchaser of the advowson, who discovered it after the arrangements for the purchase had been made ; no fraud, or wilful concealment or misrepresentation was charged :

Held, that he was not entitled to compensation in respect of this mortgage, which was a charge upon the living, but not upon the advowson, and that the purchaser was bound specifically to perform his contract.—*Woods v. Majoribanks*, 806.

AGENT. *See* PRINCIPAL AND AGENT, CONTRACT, EQUITABLE RIGHT.

ANSWER IN CHANCERY. *See* EVIDENCE.

APPEAL. *See* PRACTICE, 10.

APPROPRIATION. *See* CONTRACT.

"ARMS AND DESCENTS OF NOBILITY." *See* EVIDENCE, 7.

AWARD. *See* NUISANCE.

BANKRUPT.

The rule which prohibits double proof is not confined to the case where one of two firms consists of only one person, who is also a member of the other firm, but applies likewise to a case where the two firms consist of several persons, some of whom are members of both firms.—*Goldsmid v. Cazenove*, 785.

Ex parte Moul (1 Dea. & Ch. 44 ; Mont. 321), and *ex parte Hinton* (De Gex, 550) confirmed.

A. and *B.* were partners in *Liverpool* ; *A. B.* and *C.* were partners in *Pernambuco*. The two firms had dealings with each other. *A. B.* and *C.* drew a bill on *A.* and *B.*, and sold it to persons at *Pernambuco*, who believed that the partnerships were distinct, but that *A.* and *B.* were partners of both. On arrival in *Liverpool* the bill was accepted by *A.* and *B.*, but before the time for payment both firms became bankrupt. Under the law of *Brazil*, the holders of the bill proved against the estate of *A. B.* and *C.* at *Pernambuco* and received a dividend, and then claimed to prove under the *English* commission.

Held, that they were not entitled to this double proof.—*Id.*

BANK STOCK. *See* WILL, 6.

"BENEFACTORS." *See* EVIDENCE, 5.

BILL IN CHANCERY AND ANSWER. *See* EVIDENCE, 11.

BILLS. See **BANKRUPT.** **EQUITABLE RIGHT.** **FRAUD,** 2.

The agent and manager of the business of a *London* firm who resided in *Sweden*, gave to a merchant there about to draw bills on that firm, an "assurance that the bills will be accepted;" whereon bills of lading of cargoes of timber were transmitted to the *London* firm, and bills of exchange were drawn against them:

Held, that this assurance, though thus made and acted on, was not as between the *London* firm and the foreign merchants, to be treated as equivalent to an acceptance of the bills, so as to vest in the *London* firm legal rights from the time of such assurance given.—*Hoare v. Dresser*, 290.

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CASES SPECIALLY REVIEWED.

Spong v. Spong, 1 Dow. & Clark, 365. 168.

Mirehouse v. Scaife, 2 Myl. & Cr., 695. 168.

Greathead v. Morley, 3 Man. & Gr.; 3 Sc. N. R. 538. 346.

Dickinson v. The Grand Junction Canal Company, 7 Exch. 282. 349.

Gulliver v. Wickett, Fearne's Remarks on, Ex. Dev., 396. 532.

Anderson v. Weston, 6 Bing. N. C. 300; 8 Scott, 583. 633.

Potez v. Glossop, 2 Exc. 191. 633.

Ex parte Moult, 1 Dea. & Ch. 44; Mont. 321. 785.

Ex parte Hinton, De Gex, 550. 785.

CHARGE. See **INCUMBRANCE**, **WILL**, 5, 18, 19.

Where there is a specific devise, or a specific legacy in a will, the presumption is that it is the intention of the testator that the devisee or legatee shall have it, as it is given, in its integrity and without derogation; and a general charge subsequently introduced in the will, which may in terms be capable of comprehending the specific devise or bequest, is not alone sufficient to take it away.—*Conron v. Conron*, 168.

CHARITY. See **DOMICILE**, **MORTMAIN**, **NEW SOUTH WALES.**

A testator gave to trustees funds to be applied by them "according to their discretion for the advancement and propagation of education and learning all over the world:"

Held, that this was a valid charitable bequest, and was not void for uncertainty.—*Whicker v. Hume*, 124.

CHURCH OF ENGLAND. See **WILL.**

COMMITTEE FOR PRIVILEGES. See **EVIDENCE**, 2—4.

COMPENSATION. See **ADVOWSON**, **NUISANCE.**

CONCORDATA.—*Goldsmid v. Cazenove*, 785.

CONDITION.—See WILL.

1. There is no foundation for the doctrine, that if there be a limitation in a will, which by itself gives a vested estate, and a condition is afterwards added, on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise.—*Clavering v. Ellison*, 707.
2. A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning.—*Id.*

CONSENT, IN WRITING.

In a deed executed by *A. & B.* there was a conveyance to certain persons, with a power of sale, to be exercised with the consent, in writing, of *A. & B.*, or the survivor of them. *A.* died without having concurred in any consent to a sale. *B.* afterwards borrowed money from an insurance company, the repayment of which was secured by mortgage of his estates, of which those which were the subject of the first deed formed part. In the mortgage, to which the creditor under the first deed was a party, and which fully recited that deed, there was a power of sale given to the mortgagee :

Held, that this was a consent, in writing, sufficient to satisfy the words of the first deed.—*Montfiove v. Brown*, 241.

CONTINGENT ESTATE. See CONDITION, WILL.**CONTRACT. See BILLS, EQUITABLE RIGHT, FRAUD, 4, RAILWAY COMPANY.**

If there has been an engagement to appropriate to a certain individual a particular cargo, or a particular part of a larger cargo, as, for example, "one hundred quarters of wheat out of five hundred quarters which I have now sent," in either of these cases equity will interfere to enforce performance of the engagement ; but though the person who has made an engagement to sell a certain quantity of property, as, for example, one hundred quarters of wheat, may be shown to possess such a quantity of wheat, equity will not treat it as liable under the engagement.—*Hoare v. Dresser*, 290.

CONTROVERSY. See EVIDENCE, 17, 18, 19.**COPY. See EVIDENCE, 1, 2.****COSTS.**

1. Two appeals in the same interest and raising the same point were presented. One set of Appellants claimed to be entitled to one-third, the other to two-thirds of the property in dispute. Though the ambiguity was declared to have arisen from the act of the testator in framing the will, yet, as there had been

two separate appeals when one would have been sufficient, the House refused to make any order as to costs.—*Ricketts v. Carpenter*; *Abbott v. Middleton*, 68.

2. An appeal against a sentence of the Probate Court was dismissed: as there had been faults on both sides, the dismissal of the appeal was ordered without costs.—*Dolphin v. Robins*, 390.

On the final discussion of the *Thellusson* Will, with regard to the meaning of the words, "eldest male lineal descendant," the costs of all parties were ordered to come out of the estate.—*Thellusson v. Rendlesham*, 429.

"COURT OF CIVIL JUDICATURE." See EVIDENCE, 4.

COURT OF EQUITY. See PRACTICE, INCUMBERED ESTATES COURT.

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DEED. See CONSENT IN WRITING, TRUSTS AND TRUSTEES.

DIVORCE. See POWER.

A foreign court cannot dissolve the bonds of an *English* marriage, where the parties are not *bonâ fide* domiciled in the foreign country. *Qu.* Even if they are.—*Dolphin v. Robins*, 390.

The law is the same under the 9 *Geo.* 4, c. 31, s. 22, as it was under 1 *Jac.* 1, c. 11, s. 3.—*Id.*

A *Scotch* Court pronounced a decree of divorce in the case of an *English* marriage, where there was no real *Scotch* domicile:

Held, that this decree had no effect, either as a divorce *à vinculo*, or *à mensû et thoro*.—*Id.*

Semble, that an agreement to live separate is not equivalent in its legal effects to a judicial sentence of separation.—*Id.*

Qu. Whether, after a decree for judicial separation, a wife can acquire a domicile different from that of the husband?—*Id.*

A. and *B.* were married in *England* in 1822; they lived together till 1839, when they separated. In *February* 1854 the husband went to *Scotland*, and resided there, with some very short intervals, till *July* 1854. In *June* 1854, his wife, who had followed him to *Scotland*, sued out, in the *Scotch* courts, a process for dissolution of marriage, on account of adultery committed by him in *Scotland*. In *July* a decree for divorce *à vinculo* was pronounced. In *September* she married a *Frenchman* (according to the forms required by *Scotch* and by *French* law), and went with him to his domicile in *France*. While in *England* she had executed an *English* will, in pursuance of a power reserved to her, and in accordance with the

terms of that power. After having resided nearly two years in *France*, she executed, in *June* 1856, a holograph will (valid according to the laws of that country) revoking all previous wills :

Held (sustaining the judgment of the Court of Probate), that there had not been any change of domicile by the husband, *A.* ; that the domicile of *B.*, the wife, was that of her husband ; that the *Scotch* decree of divorce had no effect ; that she continued to be a married woman, and a domiciled *English* woman ; and that, consequently, her will of 1854 was properly admitted to probate, and the revoking paper of *June* 1856 was a nullity.—*Dolphin v. Robins*, 390.

DOMICILE. See DIVORCE, POWER, WILL.

A. was born in *Scotland* : when a young man he went to the *East Indies*, where he remained above 20 years in the Company's service. He then returned to *Scotland*, and lived in *Edinburgh*, where he put his name on the books of the municipality, married, took a house, entered into business as a partner in a banking-house, and became a member of various societies there established. At the end of a few years he left *Edinburgh* in anger ; the banking business had come to an end, and he took off his name from the books of the municipality and of the various societies, and declared his intention " never to return to *Auld Reekie*." He lived in *London*, first in lodgings, and then in houses hired for different periods, lectured on Oriental literature, and endeavoured thereby to increase the sale of some books which he had written on the *Hindustanee* language. At the end of some years he went to *Paris* to avoid some annoyances in *London*, but never made any such declarations with respect to *London* as he had made with respect to *Edinburgh*, and he left his works in *London*, and likewise some ornamental furniture which he desired a friend to keep for him till his " return." He died in *Paris*, having just before made a will in the *English* form : Held, that he had lost his *Scotch*, and obtained an *English* domicile.—*Whicker v. Hume*, 124.

Qu. Whether after a decree for judicial separation a wife can acquire a domicile different from that of her husband.—*Dolphin v. Robins*, 390.

DOUBLE PROOF. See BANKRUPT.

EDUCATION. See CHARITY, WILL, 20, 21, 22, 23.

EJECTMENT. See EVIDENCE, 19.

ENROLMENT. See PRACTICE, 10.

EQUITABLE RIGHT. *See* NUISANCE.

N., a timber merchant in *Sweden*, had dealings with *D.*, a merchant in *London*, and sent him cargoes of timber, which *D.* disposed of on a *del credere* commission, and in respect of which *N.* drew bills on *D.*. In *September* 1853 the accounts between them were unsettled, but *D.* claimed a considerable balance as due to himself. On the 29th *September* *N.* wrote to say that he expected bills of lading from two captains (whom he named), and that he had drawn for a certain amount on *D.* On the 24th *October* *H. & Co.*, merchants in *London*, received through *K.*, their agent, and the manager of their business in *Sweden*, a letter from *N.*, in which he enclosed a letter to *D.*, whereby he drew on *D.* for 1,312*l.*, which he claimed as due to himself from *D.*; and in the letter to *H. & Co.*, he desired that this enclosure might be handed to *D.*; and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that *N.* had duly delivered all the cargoes of timber contracted for between them, except one, particularly named, that then *H. & Co.* were to hand to *D.* the three bills of lading of three ships, also named; but if he would not accept the draft, nor give the acknowledgment, then *H. & Co.* were to insure the cargoes, and sell them; and *N.* drew on *H. & Co.* drafts to the amount of 1,300*l.* This letter was read to *D.*, who hesitated to accept the draft for 1,312*l.*, declaring that he was largely in advance to *N.* It was left in his bill-box for acceptance on the morning of the 24th *October*, and a formal letter, demanding compliance with the conditions of *N.*, was written to him by *H. & Co.* In the course of the same day *D.* wrote to *H. & Co.*, requesting the loan of the bills of lading, saying, "We will return them to you, if from any cause we do not accept the bill for 1,312*l.*" They were sent to him. In the same day, but after *D.*'s request had been complied with, *H. & Co.* accepted the first of *N.*'s drafts, and wrote to say they would "give protection" to all. On the morning of the 25th *October* a clerk of *H. & Co.* learned at *D.*'s counting-house that the draft for 1,312*l.* had not been accepted; but in the middle of that day it was sent to *H. & Co.* accepted. *D.*, however, refused to give up the bills of lading, and, on the advice of a solicitor (obtained before he had accepted the draft for 1,312*l.*), attached the goods in the hands of *H. & Co.* They brought an action against him to recover the bills of lading, and he filed a bill to stay the action:

Held, that he had not such equitable right on account of anything occurring before the 24th *October* as would prevail against the legal rights which *H. & Co.* acquired on that day.—*Hoare v. Dresser*, 290.

EVIDENCE. See INCUMBERED ESTATES COURT. MISDIRECTION.

1. A copy, of a plate of the arms of the Knights of the Garter, now existing in the Chapel Royal at *Windsor*, was received in evidence, the plate itself not being removable, except by authority of the *Queen*, and no such plate having been removed since first put up in the reign of *Henry 5.*—*Shrewsbury Peerage*, 1.
2. Though the rule in *Peerage* cases is that the original will must itself be produced to the Committee, a copy of a will brought by the officer from the Prerogative Court was admitted in evidence, such will having been made at a time when the course of the officers of that Court was to take copies of wills, and to return the originals to the executors, and the persons opposing the admission of the copy being the representatives of those executors.—*Id.*
3. Semble, that the recitals in private Acts of Parliament of very recent date are not evidence of the facts stated in them, such recitals being no longer submitted to the previous approval of the Judges (see *Wharton Peerage*, 12 Clark & F. 302).—*Id.*
4. When the Legislature has directed that a particular rule as to evidence shall be adopted “in every court of civil judicature,” though those words do not include a Committee for Privileges, such Committee will, if the rule itself is convenient, adopt and act upon it. The 17 & 18 *Vict.* c. 125, s. 27, which permits in all courts of civil jurisdiction comparison of handwriting as a means of evidence, was therefore adopted by the Committee.—*Id.*
5. In 1761, the Crown issued a commission to authorise the College of Herald's to receive and record the family pedigrees of all such “Benefactors,” as should be willing to contribute sums of money for the rebuilding of the Herald's College, before then destroyed in the Great Fire of London. A pedigree so furnished to the College by a member of a family, and the signature to which was proved, was received in evidence, but only as a declaration of a member of the family.—*Id.*
6. The declarations of a wife, as to the state of her husband's family, are equally admissible with the declarations of a husband as to the state of his wife's family. This admissibility

does not extend to statements made by the wife's father.—*Id.*

7. The book called "Arms and Descents of the Nobility, E. 16," though produced from the Heralds' College, is not admissible in evidence, not being kept under authority of any official order, or in discharge of any official duty.—*Shrewsbury Peerage*, 1.
8. A nobleman who had the wardship of another nobleman, under a grant from the Crown, made a will. This will contained a statement of the marriage of the ward with the testator's daughter, accompanied by a direction, that in the event of the death of the ward, his younger brother should marry the lady. The will was tendered in evidence to prove that the ward had a younger brother : Qu. Whether it was admissible.—*Id.*
9. An old "Collection of monumental inscriptions" in country churches held inadmissible to show what had been the inscription on a partly defaced tomb.—*Id.*
10. Letters addressed to a lady who had married into a particular family were produced from the custody of a member of that family, who likewise possessed many other family papers and deeds, and held by descent some of the property formerly belonging to the husband of the addressee of the letters :—Held, admissible in evidence, to show in what character she was addressed by members of her own family.—*Id.*
11. Bill filed in Chancery by *A*, as next friend to *B*. The Defendant put in an answer, which was not signed ; but there was indorsed a consent by *A.*, that this answer should be received without oath. The bill and answer were produced from the proper office :—Held, that they were admissible in evidence.—*Id.*
12. A pedigree, "touching the name and families of *Talbots*," though proved to be in the handwriting of a former Garter King of Arms, not being shown to be a book kept by him in discharge of his duty in that office, held inadmissible.—*Id.*
13. A visitation was produced from the proper office ; the commission under which it was taken could not be found. The visitation purported to have been taken by deputation from Clarenceux King of Arms. The deputation was produced. It recited the commission, and the power therein contained for Clarenceux to appoint his deputies :—Held, that the visitation was admissible in evidence.—*Id.*
14. A record of a Royal warrant of precedence was produced from the Heralds' Office ; the original had been sought for at the

- Home Office, and the State Paper Office, a part of the duty of the heralds.—*The record was received in evidence.*—
15. *W. T.* erected in a church a monument in honour of whom he described in the inscription his (*W. T.*'s) father. The inscription stated that *W. T.* had been engaged in a controversy with *C.*, but it did not directly state that *C.* was dead. It was admitted in evidence.—*Strenuous*
 16. It was necessary to prove that *W. T.* was no certificate of marriage found, and no will of *W. T.* was produced. It was in these circumstances that my nephew, *W. T.* (who was in question). And the Act Book from 1700 to 1701, granting administration to and universal legatee." Received as taken place between *W. T.* and *M. T.*
 17. A conversation between a connexion and the members of the family on the subject of the will, supposed to have taken place in that fact, was admitted in evidence without previous proof that the conversation took place are dead.—*Id.*
 18. A controversy in a family, though the subject of a suit, constitutes a *lis* sufficient to render admissible in evidence a letter written on the subject by the members of the family, and addressed to the family.—*Id.*
 19. *S. B.*, *H. B.*, and *P. B.*, were, in 1846 (the year of the session), the expectant heirs of a peerless. In that year *S. B.* wrote to *P. B.* in circumstances respecting an alleged marriage which, if true, would have the effect of disqualifying *P. B.*'s children. The peerless did not die till 1846: Held, in a case brought by the children of *P. B.*, the marriage was admissible in evidence.—*Id.*
 20. Semble, that the place named in a letter is *prima facie* evidence that it was written in that place.
 21. Where parcels are described in old documents in general nature, or of doubtful import, it is proper to be received to show what the parcels were.—*Waterpark (Lord) v. Fennell*, 650.

22. In 1704 was granted a lease of certain land in the county of *Tipperary*. The land was described in the demise, as “Lands, &c. in *Scartany*, containing 94 acres; *Garryroan*, containing 104 acres; and the village of *Scartnaglowrane*, and part of *Whitechurch* and *Tincurry*, containing 148 acres, with all rights;” there was then a reservation of mines and of the liberty of fishing and fowling, in favour of the lessor, and of “the liberty of commonage and cutting of turf on the mountain of *Tincurry*,” in favour of certain specified tenants of the lessor. The lease was a renewable lease, and had been renewed twice since that period, in the same terms. The mountain was equally known by the name of the Mountain of *Scartnaglowrane*, or, of *Tincurry*. There was a collection of houses generally called the village of *Scartnaglowrane* on one of its sides. The village of *Tincurry* was at some little distance from it. The houses of the former village, and the arable land attached to them, had from time to time been increased in number and extent at the pleasure of the lessee and his under tenants, who regularly paid him rent for the same, and their cattle alone grazed on the mountain. The lessee had always sported on the mountain: Held, that these facts had been properly admitted in evidence, to explain the words of the demise, and having been so, the Judge ought to have left to the Jury, and ought not to have decided of his own authority, the question whether the mountain of *Scartnaglowrane* passed under the demise.—*Waterpark (Lord) v. Fennell*, 650.

If a bill in equity is supported only by the testimony of a single witness, and is positively, clearly, and precisely denied by the Defendant, it will be dismissed: *secus*, if it is corroborated by letters of the Defendant or other sufficient evidence.—*Smith v. Kay*, 750.

EXECUTORY DEVISE. *See* WILL, 11.

FAMILY CONTROVERSY AND DECLARATIONS. *See* EVIDENCE, 6, 10, 16, 17, 18, 19.

FAMILY DEEDS. *See* DEEDS, TRUSTS, AND TRUSTEES, 2.

FOREIGN COURTS. *See* DIVORCE.

FORFEITURE. *See* WILL.

FRAUD.

1. When a party has practised a deception with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality. The *onus probandi* that the

end was not so attained lies on the party who used the deception.—*Smith v. Kay*, 750.

2. A security given for payment of a bill, which has existence only through a fraud, cannot be made available by the supposed holder of the bill, though he may be untainted by the fraud to which it owes its origin, but he must rely on the bill alone, and can derive no benefit from the fraudulent security.—*Smith v. Kay*, 750.

3. Representations inducing a person to enter into a particular contract, though not made at the moment the contract is actually entered into, constitute, if fraudulently made, *dolus dans locum contractui*. *Dub. Lord Wensleydale. —Id.*

4. The jurisdiction of Courts of Equity will be employed to protect infants, and is not confined to cases where there has been an abuse of a strictly fiduciary character. The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed. In the former instances influence is presumed, in the latter its existence must be proved.—*Id.*

FUNDS, THE. *See* WILL, 6.

GIFTS OVER. *See* WILL, 11.

HANDWRITING. *See* EVIDENCE, 4.

HERALDS' COLLEGE. *See* EVIDENCE, 5, 7, 12, 13, 14.

HUNTING. *See* SPORTING.

HUSBAND AND WIFE. *See* DIVORCE. DOMICILE. EVIDENCE, 6.

INCUMBERED ESTATES COURT.

1. The Incumbered Estates Court, in a case where the rights of parties are under adjudication in the Court of Chancery, is ancillary to Chancery, and though it has ordered a sale of estates, it may delay the distribution of the fund obtained by such sale until Chancery has adjudicated on a claim presented to its notice.—*Montefiore v. Browne*, 241.
2. A conveyance made by the Commissioners of the Court for the Sale of Incumbered Estates in *Ireland* is, under the 27th section of the 12 & 13 *Vict.* c. 77, "effectual to pass the fee simple discharged of all former estates," subject only to "such tenancies, leases, &c. as shall be expressed therein." Where such a conveyance is duly executed by the Commissioners, it becomes under the 49th section conclusive evidence that everything required by the Act to be done has been rightly done.—*Rorke v. Errington*, 617.

3. An application was made to the Commissioners for the Sale of Incumbered Estates in *Ireland* to direct the sale of an estate, the property of *H. R.* held a lease of part of this estate. A paper called "A Rental," &c. was, under the 23d section of the Statute, prepared and issued by the Commissioners for the purpose of informing everybody what was to be sold, in which the existence and validity of the lease were distinctly recognised, and the proper notices were given in conformity with that rental. *E.* became the purchaser of part of the estate, and in the conveyance made under the 27th section, and duly executed by the Commissioners, there was, by mistake, introduced a description, accompanied by a map, also erroneously drawn, of the land conveyed, which was the land actually held under the lease to *R.*, but that lease itself was not mentioned. In ejectment by *E.* against *R.* for this land :

Held, that evidence to impeach the conveyance was not properly admitted ; that the question founded on that evidence whether *E.* had purchased subject to the lease to *R.* was improperly submitted to the jury ; that under the 27th section, the land must be taken to have passed by the conveyance, subject only to such leases as were therein expressed ; and that the 49th section rendered the conveyance conclusive as to all acts, consents, &c. required, having been duly performed and given.
—*Rorke v. Errington*, 617.

INCUMBRANCE. See WILL.

Where a tenant for life of an estate subject to a charge bearing interest, pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remainder-man any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances, there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption. *Diss.* Lords *Cranworth* and *Wensleydale*, who held that there is no such presumption, especially when the payment is made under force of a personal obligation to pay.—*Kensington (Lord) v. Bouverie*, 557.

If the tenant for life is himself the person entitled to the benefit of the charge, and has mortgaged it, and his mortgagees have regularly been paid the interest on the mortgage debt, they are in no better situation than the personal representatives.
—*Id.*

INJUNCTION. *See* NUISANCE.

INSUFFICIENCY OF RENTS. *See* INCUMBRANCE.

INTEREST. *See* WILL, 17.

"ISSUE." *See* WILL.

KNIGHTS OF THE GARTER. *See* EVIDENCE, 1.

LACHES. *See* NUISANCE.

LANDS CLAUSES CONSOLIDATION ACT. *See* NUISANCE, 5.

LEGACIES. *See* WILL.

LIMITATION. *See* CONDITION. WILL.

LIS MOTA. *See* EVIDENCE.

A controversy in a family, though not at that moment the subject of a suit, constitutes a *lis* sufficient to render inadmissible in evidence a letter written on that subject by one of the members of the family, and addressed to another member of it.—*Butler v. Mountgarrett*, 633.

MANORIAL RIGHTS. *See* SPORTING.

MARRIAGE. *See* ADEPTION. DIVORCE.

MILLOWNER. *See* WATER.

MISDIRECTION. *See* EVIDENCE.

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having been duly performed and given.—*Rorke v. Errington*, 617.

In 1704 was granted a lease of certain land in the county of *Tipperary*. The land was described in the demise as “Lands, &c. in *Scartany*, containing 94 acres; *Garryroan*, containing 104 acres; and the village of *Scartnaglowrane*, and part of *Whitechurch* and *Tincurry*, containing 148 acres, with all rights;” there was then a reservation of mines and of the liberty of fishing and fowling, in favour of the lessor, and of “the liberty of commonage and cutting of turf on the mountain of *Tincurry*” in favour of certain specified tenants of the lessor. The lease was a renewable lease, and had been renewed twice since that period, in the same terms. The mountain was equally known by the name of the Mountain of *Scartnaglowrane*, or, of *Tincurry*. There was a collection of houses generally called the village of *Scartnaglowrane* on one of its sides. The village of *Tincurry* was at some little distance from it. The houses of the former village, and the arable land attached to them, had from time to time been increased in number and extent at the pleasure of the lessee and his under tenants, who regularly paid him rent for the same, and their cattle alone grazed on the mountain. The lessee had always sported on the mountain:—Held, that these facts had been properly admitted in evidence, to explain the words of the demise, and having been so, the Judge ought to have left to the jury, and ought not to have decided of his own authority, the question whether the mountain of *Scartnaglowrane* passed under the demise.—*Waterpark (Lord) v. Fennell*, 650.

MORTGAGEE. See INCUMBRANCE.

A mortgage given by *B.* in 1832 to an insurance company, from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by *A.* and *B.*, for the settlement of certain family estates, and for the payment of some of *A.*’s debts, and recited that in that deed a sum of 3,200*l.* was due to *D.*, as trustee for an infirmary, on a judgment against *A.* and *B.*, that that money, with interest, had been paid off, and that it was intended to enter satisfaction on that and all other judgments affecting the mortgaged lands. There were separate judgments, at the suit of *D.*, against *A.* and against *B.*, dated in 1810 and 1812, but a warrant of attorney given by *D.* in 1819, authorised satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mortgage. The mortgagee caused satis-

Legislature. For anything else, the common law remedy is properly applicable.—*Directors of Imperial Gas Company v. Broadbent*, 600.

PAYMENTS IN EXCESS.—*See* INCUMBRANCE.

PEERAGE. *See* EVIDENCE.

A. claimed a peerage. An estate was alleged to be annexed to the title. Persons who, in the event of the peerage being extinct, would be entitled to the estate, but who alleged that their title would be defeated if the claim to the peerage should be established, were allowed to appear and be heard in opposition to the claim.—*The Shrewsbury Peerage Case*, 1.

PLEADING.

In a bill to set aside securities the Petitioner alleged that when he executed the securities he “was led by the Defendant to believe, and did in fact believe, that the Defendant had become possessed of the bills for the amount of which such securities were given to him,” in a certain manner which was not the true manner; and “under the circumstances aforesaid, the execution of the sureties was obtained by fraud and misrepresentation, or concealment of the real facts:”

Held, that whatever objections might have been raised on demurrer to the sufficiency of this mode of allegation, it was too late after evidence and hearing to raise any.—*Smith v. Kay*, 750.

Qu. (by Lord *Crunworth*) whether under the authority of *Williams v. Lord Jersey* (Craig & Phil. 91), such an allegation would not have been sufficient even on demurrer.—*Id.*

PORTIONS (DOUBLE). *See* ADEMPMENT.

POWER. *See* DIVORCE. TRUSTS AND TRUSTEES, 2. 4. WILL, 18, 19.

Where there is a deed, a power of revocation to be exercised by *A.* and *B.*, and *A.* dies without exercising it, the power is at an end.—*Montefiore v. Browne*, 241.

A power was reserved to a married woman, notwithstanding coverture, by deed executed by herself, “and attested by three or more credible witnesses,” to appoint.

Qu. Whether, if she had been lawfully domiciled abroad, any execution of the power valid by the law of the country of her domicile, but not in compliance with the express terms of the power, would have been sufficient?—*Dolphin v. Robins*, 390.

PRACTICE.

1. *A.* claimed a peerage. An estate was alleged to be annexed to the title. Persons who, in the event of the peerage being extinct, would be entitled to the estate, but who alleged that

their title would be defeated if the claim to the peerage should be established, were allowed to appear, and be heard in opposition to the claim.—*Shrewsbury Peerage*, 1.

2. When the Legislature has directed that a particular rule as to evidence shall be adopted "in every court of civil judicature," though those words do not include a Committee for Privileges, such Committee will, if the rule itself is convenient, adopt and act upon it. The 17 & 18 *Vict.* c. 125, s. 27, which permits in all courts of civil judicature comparison of handwriting as a means of evidence, was therefore adopted by the Committee.—*Id.*
3. If a party is admitted to oppose a claim of peerage, he must make his opening statement after the Claimant's evidence has been closed, whether the Claimant's counsel sums up or not.—*Id.*
4. A barrister who had attended as counsel for the Claimant of a peerage during the whole of one session, was, at the commencement of the next, appointed *Attorney-General*. The Committee for Privileges allowed him to continue to act as counsel for the Claimant, and accepted the *Solicitor-General* as his representative on the part of the Crown.—*Id.*
5. Trustees entered into possession of rent and profits, and paid them over under a trust deed to a married woman to her separate use; it afterwards appeared that she was not entitled to receive them, but that upon the true construction of a will they ought to have gone to another person. That person filed a bill, and a decree was made in his favour, but an account of the rents and profits was only ordered from the date of the filing of the bill:
Held, that whether an account should be directed from the filing of the bill, or from an anterior time, is a matter of discretion, and that in this case the discretion had been rightly exercised.—*Vernon v. Wright*, 35.
6. The Respondent was allowed to object to a part of the decree though he had not brought any cross appeal.—*Id.*
7. Two appeals in the same interest and raising the same point were presented. One set of Appellants claimed to be entitled to one-third, the other to two-thirds of the property in dispute. Though the ambiguity was declared to have arisen from the act of the testator in framing the will, yet, as there had been two separate appeals when one would have been sufficient, the House refused to make any order as to costs.—*Ricketts v. Carpenter*, 68.

8. After a verdict for a Plaintiff, a rule to enter a nonsuit was obtained, and the grounds were stated to be "that the goods lost or damaged were received and carried by the Defendants under a contract, by the conditions of which the Defendants were not liable for loss or damage by fire." A judgment was given, which was reversed in the Exchequer Chamber, and the case was brought up to this House :

Held, that it was competent to the Defendants on the hearing of the case here to discuss the question, whether any contract whatever existed as between them and the Plaintiff.—*Bristol and Exeter Directors v. Collins*, 194.

9. A Court of Equity may, by additional orders, without a bill of review or a re-hearing, deal with a fund which is still in court.—*Montefiore v. Browne*, 241.

But where the party so requiring the Court to deal with the fund might have appeared at an earlier stage of the cause, he will be required to pay all the additional costs which have been occasioned by the imperfect manner in which his claim was brought forward.—*Id.*

10. The time for appealing to this House against a decree or order of the Court of Chancery in *Ireland* is still, notwithstanding the 13 & 14 *Vict.* c. 89, s. 30, to be calculated from the time of the enrolment of that decree or order, and not from the day when it was pronounced in Court.—*Lambert v. Peyton*, 423.

11. The House will not reconsider a question which it has once decided.—*Thellusson v. Rendlesham*, 429.

12. A counsel in a cause, being afterwards raised to the Bench, is not thereby precluded from taking part in the hearing and discussion of that cause, but he may properly (unless his doing so would entail great inconvenience and expense on the parties or perhaps from his being, as in Chancery, the sole judge of the court, amount to a denial of justice) decline to take part in such hearing and decision.—*Id.*

13. A will was impeached as being void for uncertainty, and its construction was likewise contested. The Court below sustained its validity, and put a construction on it. The next of kin appealed on the first point. Two persons claiming to be devisees appealed on the second : all the parties appeared by different counsel. As their interests were the same, only one counsel was heard for each of the appealing devisees, and only one for each of the Respondents : the counsel for the next of kin were then heard, and were answered in like manner by one of the

RECITALS IN PRIVATE ACTS. *See* EVIDENCE, 3.

REMOTENESS. *See* WILL, 14.

REPUBLICATION OF WILL. *See* WILL.

"RESIDUE." *See* WILL 18, 19.

REVOCATION, POWER OF. *See* POWER, TRUSTS, and TRUSTEES, 2, 4. WILL, 19, 20.

SALE, POWER OF. *See* WILL.

SCOTCH COURTS. *See* DIVORCE.

SECURITY. *See* FRAUD.

A security given for the payment of a bill, which has existence only through a fraud, cannot be made available by the supposed holder of the bill, though he may be untainted by the fraud to which it owes its origin, but he must rely on the bill alone, and can derive no benefit from the fraudulent security.
—*Smith v. Kay*, 750.

SEPARATION. *See* DIVORCE.

SHOOTING. *See* SPORTING.

SPECIFIC BEQUESTS AND DEVISES. *See* WILL, 5.

Where there is a specific devise, or a specific legacy in a will, the presumption is, that it is the intention of the testator that the devisee or legatee shall have it, as it is given in its integrity and without derogation; and a general charge subsequently introduced in the will, which may in terms be capable of comprehending the specific devise or bequest, is not alone sufficient to take it away.

(*Spong v. Spong*, 1 Dow. & C. 365, approved of.

Mirehouse v. Scaife, 2 Myl. & Cr. 695, commented on.)—

Conron v. Conron, 168.

SPECIFIC PERFORMANCE. *See* ADVOWSON.

SPORTING.

The right of hunting, shooting, &c., is an interest in the realty, and a grant of it is a license of a *profit a prendre*.—*Ewart v. Graham*, 331.

This right was in the owner of a manor. There was no right of free warren in the manor. An Act of Parliament, reciting that "there is within and parcel of the said manor a certain stinted pasture, called *Bailey Hope*," that *J. G.*, as lord of the manor, was owner of the soil thereof, and was "entitled to all mines and minerals within and under the same, and to other rights, royalties, liberties, and privileges in and over the same," that he and all the owners of tenements thereon, were entitled to cattle-gates and rights of turbary thereon; and that for the purposes of improvement it was desirable to allot the stinted

pasture, in severalty, among the persons entitled to the cattle-gates, enacted that it should be so allotted; and made each allotment "freehold to all intents and purposes," but provided that nothing therein contained shall prejudice, &c., the rights, &c., of *J. G.*, his heirs and assigns, lords of the manor of *N.*, to any seignories, &c. belonging to such manor: "but that the said *J. G.*, his heirs and assigns, shall and may at all times hereafter enjoy all rents, services, &c., and also all right of hunting, shooting, fishing and fowling, on, through, and over the said stinted pasture, and every part and allotment thereof, and all other seignories, royalties and privileges to the lord of the said manor of *N.*, for the time being, incident or belonging (other than those declared to be barred by this Act), in as full a manner as if this Act had not been passed:"

Held, that this proviso did not apply to mere manorial rights, but that the exclusive right of hunting and shooting over the allotments was thereby reserved to *J. G.*—*Ewart v. Graham*, 331.—(*Greathead v. Morley*, 3 Man. & Gr. 139, questioned).

STATUTES.

- 9 *Geo.* 2, c. 36 Mortmain. 124.
- 17 & 18 *Vict.* c. 125, s. 27. Evidence of Handwriting. 2.
- 51 *Geo.* 3, c. 10. Sporting. 331.
- 9 *Geo.* 4, c. 31, s. 22. Marriage. 390.
- 1 *Jac.* 1, c. 11, s. 3. Marriage. 390.
- 14 *Vict.* c. 89, s. 30. Enrolment. 423.
- 17 *Vict.* c. lv. Companies Clauses Act, 1845; Lands Clauses Consolidation Act, 1845; Gas Works Clauses' Act, 1847. 600.
- 12 & 13 *Vict.* c. 77, s. 27, 49. 617.

STREAMS. *See* WATER.

TENANT FOR LIFE. *See* WILL, 17.

TRUST AND TRUSTEE. *See* PRACTICE. WILL, 5, 6.

1. A testator gave to trustees funds to be applied by them "according to their discretion for the advancement and propagation of education *and* learning all over the world:"

Held, that this was a valid charitable bequest, and was not void for uncertainty.—*Whicker v. Hume*, 124.

2. *A.* and *B.*, father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of *A.* Certain estates were conveyed to trustees, with a power to sell, on the consent in writing of *A.* and *B.*, or the survivor, and to apply the produce of the sale in payment of debts therein specified. *A.* was indebted to *D.*, as trustee for an infirmary, and *A.* and *B.* had given joint and separate warrants of attorney

to secure the debt. Separate judgments had been entered up against *A.* and against *B.* The amount of the sums thus due was stated in the deed. *D.* had some legal interest in the estates themselves. He was a party to the deed, and executed it.

Held, that this deed created a trust in favour of the infirmity of which he was a trustee.—*Montefiore v. Browne*, 241.

3. In this deed there was a power of revocation to be exercised by *A.* and *B.*; *A.* died without exercising it.

Held, that the power of revocation was then at an end.—*Id.*

4. In the deed executed by *A.* and *B.* there was a conveyance to certain persons, with a power of sale, to be exercised with the consent, in writing, of *A.* and *B.*, or the survivor of them. *A.* died without having concurred in any consent to a sale. *B.* afterwards borrowed money from an insurance company, the repayment of which was secured by mortgage of his estates, of which those which were the subject of the first deed formed part. In the mortgage, to which the creditor under the first deed was a party, and which fully recited that deed, there was a power of sale given to the mortgagee.

Held, that this was a consent, in writing, sufficient to satisfy the words of the first deed.—*Id.*

5. A mortgage given by *B.* in 1832 to an insurance company, from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by *A.* and *B.*, for the settlement of certain family estates, and for the payment of some of *A.*'s debts, and recited that in that deed a sum of 3,200*l.* was due to *D.*, as trustee for an infirmity, on a judgment against *A.* and *B.*, that that money, with interest, had been paid off, and that it was intended to enter satisfaction on that and all other judgments affecting the mortgaged lands. There were separate judgments, at the suit of *D.*, against *A.* and against *B.*, dated in 1810 and 1812, but a warrant of attorney given by *D.* in 1819, authorised satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mortgage. The mortgagee caused satisfaction to be entered on the roll as to the separate judgments of 1810 and 1812, but made no farther inquiries :

Held, that as the mortgage itself had recited a joint judgment for a specific sum, the mortgagee had been guilty of negligence in not looking farther into the matter, and must therefore be taken to have had a proper notice of the unsatisfied claim under the deed of 1823.—*Id.*

Trustees and guardians of infants are not the only persons against whom equity will interfere where influence is acquired and abused, and confidence reposed and betrayed.—*Smith v. Kay*, 750.

WATER.

The principles which regulate the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.

Where, therefore, a landowner and millowner who had for above 60 years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining landowner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title, as landowners, to the use of the water :

Held, that *A.* had no right of action (*Dickinson v. Grand Junction Canal Company* questioned).—*Chasemore v. Richards*, 349.

WILL. See COSTS, 1. DIVORCE. DOMICILE, 1. EVIDENCE, 2. 16.

1. Devise "to the right heirs of my grandfather *S.*, deceased, by *M.*, his second wife, also deceased, for ever :

Held, that the first words created an estate tail, which was not enlarged into an estate in fee by the use of the words "for ever."—*Vernon v. Wright*, 35.

2. A testator gave an annuity of 2,000*l.* to his widow, and set apart, out of his personal property, a sum sufficient to provide for its payment. He then directed that, on the death of his widow, the sum so set apart should "become the property of my son *George*, so far as he shall receive the interest during his life, and on his death the principal sum to become the property of any children he may leave, in such sums as he shall direct, *but* in the event of my son dying before his mother, then the principal sum to be divided among the children of my daughters, the deceased *Jane R.* and *Mary P.*, and of my now surviving daughter, *Elizabeth M.* (should she leave any issue) in equal portions." *George* married after the date of the will, had one son, and died before the testator :

Held, affirming the decree of the *Master of the Rolls*, that on the death of the testator's widow, the son of *George* became entitled to the fund which had been set apart to provide the annuity, for that the property in it vested in the children of *George*,

independently of their father, who merely took a life-interest in it.—*Ricketts v. Carpenter* ; *Abbott v. Middleton*, 68.

3. A will must be executed according to the law of the country where the testator was domiciled at the time of his death.—*Whicker v. Hume*, 124.

4. The grant of probate not appealed against, conclusively established that it was so executed.—*Id.*

5. A testator residing in *Ireland*, who was possessed of real and personal property, made his will in *June* 1836, by which he devised certain freehold estates to trustees for a term of 99 years, to pay an annuity to his wife, and another annuity to one of his sons for life ; the estate after the death of his son to go to the sons of that son in tail male. He gave other lands, some freehold, some leasehold, to other sons. He created annuities, and gave legacies, directed the different properties devised and bequeathed to fall, in certain events, into his residuary estate, and at the end of his will directed that, "in case my personal and chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real and freehold estates, and I hereby charge and incumber the same with the payment thereof." In a codicil he said, "I charge and incumber all my estates of every description, both real and personal, with the following legacies ;" and he gave to these legatees a power to distrain on any part of his estates or property of every description for the arrears of the interest due on the annuities given by the codicil :

Held, affirming a decree of the *Lord Chancellor of Ireland*, that the legacies were not charges on the specifically devised estates.—*Conron v. Conron*, 168.

6. A testatrix possessed property in Consols, Reduced Annuities, and in Bank Stock ; she made her own will, and she left to her brother "Everything I may be possessed of at my decease, for his life ; and should he marry, and have children of his own, to those children after ; but should he die a bachelor, I leave the whole of my fortune now standing in the funds to *E. S.*:"

Held, affirming the Judgment of the Court below, that the Bank Stock did not pass to *E. S.* upon the brother dying a bachelor. *dub.* Lord *Chelmsford* and Lord *Kingsdown*.—*Slingsby v. Grainger*, 273.

7. A testator who had three sons, *A.*, *B.*, and *C.*, directed an accu-

mulation of his property for a certain period, at the end of which the trustees were to divide it into three lots, one of which was to be conveyed to "the eldest male lineal descendant then living of *A.*" When the time for making the allotment arrived, there were two persons who claimed to be entitled to the first lot, a grandson of *A.*'s eldest son, and a son of *A.*'s youngest son; the former being "eldest" in line, the latter "eldest" in years among the male descendants of *A.*:—Held, that the will was not void for uncertainty: Held, also, that on the true construction of the words used by the testator, the grandson of *A.*'s eldest son was entitled to the first lot.—*Thellusson v. Rendlesham*, 429.

8. The will directed the trustees to receive the rents and profits of the testator's lands, and from time to time to cut timber and sell it, and to lay out the rents and profits and the price of the timber in the purchase of other lands, the rents and profits of which, and the price of the timber cut from which, were to be laid out in the same manner; but there was no direction as to the manner in which the rents and profits of the last-mentioned lands were to be disposed of:—Held, that this omission (there being a general direction at the end of the will to lay out the money of the testator, however arising, in the funds, and to sell and re-purchase as the trustees might think fit, until a sufficient sum could be accumulated to make a proper purchase of land, should present itself) did not leave any part of the fund undisposed of, so as to establish a title to it in the next of kin.—*Id.*
9. Held (Lord *St. Leonards diss.*), that the question of uncertainty had not been disposed of in any previous question upon this the *Thellusson Will*.—*Id.*
10. The costs of all parties were ordered to come out of the estate.—*Id.*
11. Though a gift over may in one alternative operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder.—*Evers v. Challis*, 531.
12. The invalidity of one alternative will not necessarily defeat the other.—*Id.*
13. Devise to *E.* for life, "and from and after her decease to such child or children as she may have, if a son or sons who shall live to attain the age of twenty-three, and, if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common, &c.;" and in case of the death of any

son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. And in case *E.* has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daughter. "And also, in case *E.*'s children shall die under" the ages mentioned, "or if she has none," then to *J. A.* and *S.* for life, and afterwards to their sons and daughters on attaining the above ages respectively." There were similar devises to *J. A.* and *S.*, but in the devises to *J.* and *S.* nothing was said as to total absence of issue; in that to *A.* the words used were "and farther, in case *A.* shall die without issue." *E.* first and *A.* afterwards died without ever having had a child.

Held, that on the death of *A.* the gift over in favour of a daughter of *J.*, who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of *A.*) determined, the contingency on which the remainder was to take effect, had occurred.—*Evers v. Challis*, 531.

14. Held also, that though the gift over, on the death of sons under twenty-three, was void for remoteness, the gift over on death without having had issue, was not thereby affected.—*Id.*
15. *A.* died without ever having had issue:—Held, that though in the devise to her the not having issue was not expressed, it was necessarily implied in the provision as to her dying without children who should attain twenty-three or twenty-one, and therefore on her death without ever having had issue, the gift over took effect.—*Id.*
16. *Fearne's* Comment on *Gulliver v. Wickett* (Ex. Dev. 396) remarked on.—*Id.*
17. Where the will of the tenant for life disposes of the charge "and interest," those words cannot be taken to refer to anything but the interest which will accrue after his death, till the charge itself is redeemed.—*Kensington (Lord) v. Bouverie*, 557.
18. If there are general gifts of legacies, and then of the rest and residue, real and personal, blending the whole in one mass, though accompanied by a power to the legatee of the residue, "to dispose of the same in any manner he may think proper," the legacies are a charge on the realty (*dub.* Lord *Wensleydale*).—*Greville v. Browne*, 689.
19. A testator gave a legacy, which, if not received, was to form "part of the residue of my property." Then followed a legacy to *A. B.*; but if the legatee should die before time for

payment, it was to be considered "as part of the residue of my property, and to go and merge in the same." After some small legacies, his will concluded, "All the rest, residue, and remainder of any property I may die possessed of, whether estates, freeholds, &c. &c., bonds, bills, &c., annuities, &c., I devise and bequeath to my son, in the fullest manner I can, with liberty to him to dispose of the same in any manner he may think proper." The son was named as one of the executors, but did not act as such. The will was proved by the other executor. The son mortgaged the real estates :

Held, that the legacy to *A. B.* was a charge on the real estates, and on a sale of them in the Encumbered Estates Court, took precedence over the mortgages, notwithstanding the general power to the devisee to dispose of the estates in any manner he thought proper.—*Greville v. Browne*, 689.

20. There is no foundation for the doctrine, that if there be a limitation in a will, which by itself gives a vested estate, and a condition is afterwards added, on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise.—*Clavering v. Ellison*, 707.

21. A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning.—*Id.*

22. *G. C.* gave his real and personal estates to trustees, upon trust (among other things) to invest his personal estate, and pay the interest to his son, *T. J. C.*, for life, then to all the children of his son, and their heirs; and he gave all the residue amongst all the children, to be paid as they should attain twenty-one; "provided that the devises hereinbefore contained to the children of my said son are made upon this express condition, that they be educated in *England*, and in the Protestant religion, according to the rites of the Church of *England*; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of *England*, then I do hereby revoke," &c., and there was a gift over.

Held, that the children took equitable estates tail, subject to be divested upon certain contingencies; that the proviso constituted a condition subsequent to defeat vested estates, and was therefore to be construed strictly.—*Id.*

23. The children went with their father to *France* when about eight years of age, and remained with him there from 1802 to 1810, during which time he was detained as a prisoner of war by *Napoleon*, but they might have returned to *England* had

their father so pleased. They were, during their continuance in *France* educated at Roman Catholic schools, but were not proved to have been taught Roman Catholic doctrines, but were able to receive religious instruction from a Protestant minister who attended each of their schools. On their return to *England* at the peace of 1814, they were sent to *English* Protestant schools :

Held, that under these circumstances they had not incurred the forfeiture within the words of the proviso.—*Clavering v. Ellison*, 707.

Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil.—*Hopwood v. Hopwood*, 728.

WORDS.

“Court of Civil Judicature,” applies to Committee for Privileges.—*Shrewsbury Peerage*, 1.

“Right heirs”—“for ever.”—*Vernon v. Wright*, 35.

“Dying without issue.”—*Ricketts v. Carpenter*, 68. *Evers v. Challis*, 531.

“Advancement and propagation of education.”—*Whicker v. Hume*, 124.

“The funds.”—*Slingsby v. Grainger*, 273.

“Eldest male lineal descendant.”—*Thellusson v. Rendlesham*, 629.

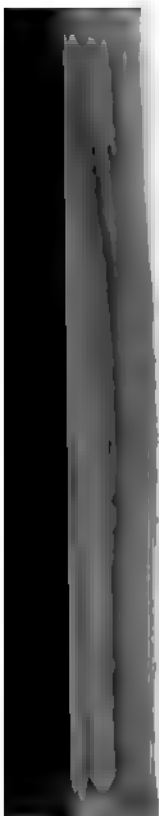
“Interest.”—*Kensington v. Bouverie*, 557.

“Village ;” “Mountain.”—*Waterpark (Lord) v. Fennell*, 650.

“Residue.”—*Greville v. Browne*, 689.

“Education in England and in the Protestant religion.”—*Clavering v. Ellison*, 707.

“Farther.”—*Hopwood v. Hopwood*, 728.



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